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No. 2945

No. 14816

United States
Court of Appeals
for the Ninth Circuit

WILLIAM R. LeVECKE and REED LeVECKE,
Appellants,

vs.

GRIESEDIECK WESTERN BREWERY CO., a corporation, and CARLING BREWING CO., a corporation,
Appellees.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. —11-30-55

No. 14816

United States
Court of Appeals
for the Ninth Circuit

WILLIAM R. LeVECKE and REED LeVECKE,
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Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

THOMAS A. WOOD,
LARWILL & WOLFE,

1017 Citizens N. Bank Building,
Los Angeles 13, California.

For Appellees:

SHEPPARD, MULLIN, RICHTER & BALTHIS,
CAMERON W. CECIL,

458 South Spring Street,
Los Angeles 13, California. [1*]

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* Page numbers appearing at foot of page of original Transcript of Record.

In the United States District Court, Southern District of California, Central Division

No. 18034-PH

WILLIAM LeVECKE and REED LeVECKE, doing business as The LeVecke Company,
Plaintiffs,

vs.

GRIESEDIECK WESTERN BREWERY CO., a corporation, and CARLING BREWING CO., a corporation,
Defendants.

PETITION FOR REMOVAL

To the Honorable United States District Court, Southern District of California, Central Division, and to the onorable Judges thereof:

The petition of defendant The Griesedieck Company, sued herein as Griesedieck Western Brewery Co., a corporation, and defendant Carling Brewing Company Incorporated, sued herein as Carling Brewing Co., a corporation, respectfully shows:

I.

That the plaintiffs are and at all times herein mentioned have been citizens and residents of the State of California as alleged in paragraph I of the first cause of action of their complaint on file herein. [2]

II.

That the defendant The Griesedieck Company, a corporation, is now and at all times herein men-

tioned has been a corporation organized and existing under and by virtue of the laws of the State of Illinois and is now and at all times herein mentioned has been a citizen and resident of the State of Illinois and a non-resident of the State of California as alleged in paragraph II of the first cause of action of the complaint on file herein.

III.

That the defendant Carling Brewing Company Incorporated, a corporation, is now and at all times herein mentioned has been a corporation organized and existing under and by virtue of the laws of the State of Virginia and is now and at all times herein mentioned has been a citizen and resident of the State of Virginia and a non-resident of the State of California, though it is alleged in paragraph II of the second cause of action of the complaint on file herein that said defendant Carling Brewing Company Incorporated, a corporation, is an Ohio corporation.

IV.

That the above entitled action is of a civil nature and the value of the matter in controversy therein, exclusive of interest and costs, is in excess of the sum of $3,000.00 in that by said action the plaintiffs seek to recover judgment against the defendant The Griesedieck Company, a corporation, in the sum of $1,125,000.00, and further seek to recover judgment against the defendant Carling Brewing Company Incorporated, a corporation, in the sum of $1,125,000.00. [3]

V.

That the defendants, and each of them, dispute the plaintiffs' claim in its entirety and they, and each of them, will defend said action.

VI.

That the time provided by law within which to present this petition has not expired and that the time within which the defendants, and each of them, are required to answer or otherwise appear in said action has not yet expired.

VII.

That the plaintiffs commenced the above entitled action in the Superior Court of the State of California, in and for the County of Los Angeles, on February 24, 1955, by filing their complaint therein and causing summons to be issued thereon on said date.

VIII.

That on March 10, 1955, the plaintiffs attempted to effect service of summons and complaint in the above entitled action upon the defendant The Griesedieck Company, a corporation, by serving the Secretary of State of the State of California; that a copy of the summons and complaint was received by the defendant, The Griesedieck Company, at its offices in Belleville, Illinois, on March 21, 1955; that said defendant, The Griesedieck Company, has not yet appeared in said action in the Superior Court of the State of California, in and for the County of Los Angeles.

IX.

That on March 22, 1955, the plaintiffs attempted to effect [4] service of summons and complaint in the above entitled action upon the defendant, Carling Brewing Incorporated, a corporation, by delivering to K. W. Burrie, the regional sales manager of the defendant Carling Brewing Company Incorporated, a copy of the summons and complaint; that said defendant, Carling Brewing Company Incorporated, has not yet appeared in said action in the Superior Court of the State of California, in and for the County of Los Angeles.

X.

That the defendants file herewith a copy of all processes, pleadings, and orders served upon them, and each of them, in such action, and will promptly, after the filing of this petition and bond herewith, give written notice thereof to the plaintiffs, and each of them, and file a copy of this petition with the Clerk of the Superior Court of the State of California, in and for the County of Los Angeles.

XI.

That the defendants, and each of them, present and file herewith a bond with good and sufficient surety conditioned that the defendants, and each of them, will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

XII.

That attached hereto and made a part of this petition as though herein set forth in full is the affidavit of Robert F. Schlafly, marked Exhibit "A", and the affidavit of Edward D. Jones, marked Exhibit "B". [5]

XIII.

That all non-nominal defendants have joined in this petition for removal.

Wherefore, the defendants, and each of them, pray that this petition and the bond filed herewith be accepted and that the aforesaid cause be removed from the Superior Court of the State of California, in and for the County of Los Angeles, to the United States District Court, Southern District of California, Central Division.

Dated: March 29, 1955.

SHEPPARD, MULLIN, RICHTER & BALTHIS,
JAMES C. SHEPPARD,
EDWIN H. FRANZEN,

/s/ CAMERON W. CECIL,
Attorneys for Defendants [6]

Duly Verified. [7]

EXHIBIT "A"

AFFIDAVIT

State of Missouri,
City of St. Louis—ss.

Robert F. Schlafly, being first duly sworn, on his oath says:

1. I reside at 7120 Washington Avenue, St. Louis County, Missouri. I am Assistant Secretary of Carling Brewing Company Incorporated.

2. Carling Brewing Company Incorporated is now, and has been throughout its corporate existence, a corporation incorporated under the laws of the State of Virginia. Said corporation is not now, and has never been, incorporated under the laws of the State of California.

3. Carling Brewing Company Incorporated has its principal place of business in Cleveland, Ohio. To the best of my information and belief there is no corporation named Carling Brewing Company existing under and by virtue of the laws of the State of Ohio.

/s/ ROBERT F. SCHLAFLY

Subscribed and sworn to before me, a Notary Public in and for the City of St. Louis, Missouri, this 25th day of March, 1955.

[Seal] /s/ BETTY PROCTOR,
Notary Public [8]

EXHIBIT "B"

AFFIDAVIT

State of Missouri,
City of St. Louis—ss.

Edward D. Jones, being first duly sworn, on his oath says:

1. I reside at 6349 Ellenwood Avenue, in St. Louis County, Missouri. I am the President of The Griesedieck Company.

2. The Griesedieck Company is a corporation incorporated under the laws of the State of Illinois; it is the same corporation which was formerly named the Griesedieck Western Brewery Company but said corporation changed its name to The Griesedieck Company on November 1, 1954, by amendment of its Articles of Incorporation.

3. The Griesedieck Company, formerly named Griesedieck Western Brewing Company, is now, and has been throughout its corporate existence, a corporation incorporated under the laws of the State of Illinois and it is not now and has never been incorporated under the laws of the State of California.

/s/ EDWARD D. JONES

Subscribed and sworn to before me, a Notary Public in and for the City of St. Louis, Missouri, this 25th day of March, 1955.

[Seal] /s/ HAMILTON GROSSE,
Notary Public [9]

[Endorsed]: Filed March 29, 1955.

[Title of District Court and Cause.]

COPY OF ALL PROCESSES, PLEADINGS, AND ORDERS SERVED UPON THE GRIESEDIECK COMPANY

In the Superior Court of the State of California in and for the County of Los Angeles

No. 640630

William LeVecke and Reed LeVecke, dba The LeVecke Company, Plaintiffs, vs. Griesedieck Western Brewery Co., a corporation and Carling Brewing Co., a corporation, Defendants.

SUMMONS

The People of the State of California Send Greetings: to Griesedieck Western Brewery Co., a corporation, and Carling Brewing Co., a corporation, Defendants.

You are directed to appear in an action brought against you by the above named plaintiffs in the Superior Court of the State of California, in and for the County of Los Angeles, and to answer the Complaint therein within ten days after the service on you of this Summons, if served within the County of Los Angeles, or within thirty days if served elsewhere, and you are notified that unless you appear and answer as above required, the plaintiffs will take judgment for any money or damages demanded in the Complaint, as arising upon con-

tract, or will apply to the Court for any other relief demanded in the Complaint.

Given under my hand and seal of the Superior Court of the County of Los Angeles, State of California, February 24, 1955.

[Seal] HAROLD J. OSTLY,
County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles.

/s/ By M. W. NELSON, Deputy [11]

[Title of Superior Court and Cause.]

COMPLAINT

(Damages, Breach of Contract and Fraud)

Come now the plaintiffs and for a cause of action against the defendants allege:

I.

That the plaintiffs are individuals who reside in the County of Los Angeles, State of California, and do business under the fictitious firm name of The LeVecke Company with their principal place of business in the County of Los Angeles, State of California, and have filed with the Clerk of the said County, and published [12] therein, a certificate showing their use of said fictitious name as required by Sections 2466 and 2468 of the California Civil Code and have done all things required by said sections.

II.

That the defendant Griesedieck Western Brewery Co., a corporation, hereinafter called Griesedieck, is a corporation existing under and by virtue of the laws of the State of Illinois, with its principal place of business at Belleville, Illinois; that said defendant, at all times herein referred to, was transacting business in said State of California but failed to file a statement required of a corporation by Section 6403 of the Corporation Code of the State of California; that defendant's agents in the State of California for the purposes of carrying on its business in said state are, and at all times herein referred to were, the plaintiffs.

III.

That in or about the month of August, 1950, the plaintiffs and the said defendant entered into an oral contract whereby plaintiffs agreed to act exclusively as the agents and representatives of defendant and as the sole distributors of the defendant's products, namely Stag Beer and Hyde Park "75" beer, in the western part of the United States and more particularly in the States of California, Arizona and Nevada, and defendant agreed to supply plaintiffs with said products on order by plaintiffs from time to time at agreed upon wholesale prices; that it was orally agreed by and between said parties that said contract could be terminated by either party only upon the giving by the terminating party to the other party one year's [13] notice of termination; that said contract has been reaffirmed from time to time, both orally and in writing, by both

parties, with the last said affirmation having been made by the defendant in or about the month of September, 1954.

IV.

That in furtherance of said contract the plaintiffs have devoted themselves exclusively to acting as the agents and representatives of defendant and to the distribution of defendant's said products to the exclusion of all others and have established and built up retail outlets for said products in the said area of California, Arizona and Nevada; that plaintiffs have been able to establish and build up said retail outlets by their representations to said retail concerns and businesses that they, the plaintiffs, would be able to give said retail outlets and concerns one years' notice prior to the discontinuance of either the Stag or Hyde Park "75" labels or the termination of plaintiffs' employment as defendant's agents, representatives and distributors so that said retail outlets would be able to replace defendant's said beers with other brands and would therefore be able to avoid the loss of customer good will which loss would follow from any immediate discontinuance of defendant's said brands of beer; that defendant from time to time, did, through its officers and representatives other than plaintiffs, confirm to said retail outlets plaintiffs' said representations as to one years notice being given before defendant's said brands of beer would be discontinued or plaintiffs would be replaced as defendant's agents, representatives and distributors [14] in said geographical area; that said retail outlets and dealers agreed to

and did handle and carry defendant's said brands of beer in reliance on plaintiffs' personal reputation and on their representations as set forth hereinabove as confirmed by defendant's officers and other representatives; that the plaintiffs have, at all times done and performed all of the stipulations, conditions and agreements stated in said contract to be performed on their part at the time and in the manner therein specified.

V.

That on or about the 28th day of October, 1954, plaintiffs placed an order with the defendant for three (3) freight car loads of the said Stag beer and Hyde Park "75" beer; that on or about the 28th day of October, 1954, defendant did fail and refuse to deliver said merchandise and did then and there further breach said contract by stating to plaintiffs through its agent that defendant no longer desired plaintiffs' services and that defendant would no longer honor plaintiffs' orders for said products and that the relationship between plaintiffs and defendant was terminated as of November 1, 1954; that at no time did defendant ever give plaintiffs one year's notice of termination of said contract as required thereby.

VI.

That by reason of the breach of said contract by defendant as aforesaid, plaintiffs have been damaged in the sum of $750,000.00, no part of which has been paid.

For a Second, Separate and Further cause of Action, Plaintiffs Allege:

I.

Paragraphs I, II, III, IV and V of the first cause of action are incorporated herein and by reference are made a part [15] hereof as fully as though set forth at length.

II.

The defendant Carling Brewing Co., hereinafter called Carling, is a corporation existing under and by virtue of the laws of the State of Ohio with its principal place of business in Cleveland, Ohio. That at all times herein mentioned said defendant was and now is doing business in the State of California, with an office for the transaction of said business in the City of Los Angeles, California, although it has not qualified with the Secretary of the State of California to do business in said State of California.

III.

That in or about the month of September, 1954, the defendant Carling did enter into an agreement whereby it was to purchase all of the assets of the defendant Griesedieck for a consideration of about $10,000,000.00 to be paid by said defendant Carling to defendant Griesedieck; that defendant Carling did assume all of defendant Griesedieck's rights and obligations under and by virtue of the contract by and between said defendant Griesedieck and plaintiffs; that defendant Carling did, on or about the 27th day of September, 1954, represent to plain-

tiffs that it would continue to honor the contracts of defendant Griesedieck after said defendant Carling assumed and took over the business of defendant Griesedieck; that plaintiffs believed and acted in reliance on said representation by said defendant Carling.

IV.

That by reason of the breach of said contract by defendant as aforesaid, plaintiffs have been damaged in the sum of $750,000.00, no part of which has been paid. [16]

For a Third, Separate and Further Cause of Action, Plaintiffs Allege:

I.

Paragraphs I, II, III, IV and V of the first cause of action and paragraphs II and III of the second cause of action are incorporated herein and by reference are made a part hereof as fully as though set forth at length.

II.

That in the month of August, 1954, at Los Angeles, California, the defendant Griesedieck falsely and fraudulently and with intent to deceive and defraud the plaintiffs, represented to plaintiffs that defendant Carling would continue to produce and distribute and market beer under the brand labels of Stag beer and Hyde Park "75" beer and that defendant Carling would not alter or change the existing contractual arrangements between defendant Griesedieck and its agents, representatives and distributors, including plaintiffs, and that defendant

Carling would in fact honor said agreements and would continue to do business with persons having said contractual arrangements with defendant Griesedieck in the same manner and under the same circumstances as defendant Griesedieck had done prior to the time of said representation.

III.

That on the 5th day of September, 1954, defendant Carling falsely and fraudulently and with intent to deceive and defraud the plaintiffs represented to plaintiffs that it would continue to produce and distribute and market beer under the brand labels of Stag and Hyde Park "75" beer and that defendant Carling would not alter or change the existing contractual arrangements between defendant Griesedieck and these plaintiffs, and that defendant Carling would honor said agreements and would continue to do business with them [17] under the contractual arrangements that plaintiffs had with defendant Griesedieck, and in the same manner and under the same circumstances as defendant Griesedieck had done prior to that time.

IV.

That said representations by defendants Carling and Griesedieck were false and were then and there known by defendant Griesedieck and defendant Carling to be false; that in truth and in fact defendants Griesedieck and Carling then and there knew that defendant Carling intended to discontinue distributing and selling said Stag Beer and Hyde Park

"75" beer in the western United States area in which plaintiffs represented defendant Griesedieck and did then and there intend to dispense with plaintiffs' services in all respects.

V.

That plaintiffs believed and relied upon said representations and were thereby induced to hold themselves out as the agents of the defendant Carling as well as defendant Griesedieck and to continue to devote themselves exclusively to selling and supplying said Stag beer and Hyde Park "75" beer to retailers in said geographical area.

VI.

That by reason of the premises plaintiffs have been damaged in the sum of $750,000.00.

For a Fourth, Separate and Further Cause of Action, Plaintiffs Allege:

I.

Paragraphs III, IV and V of the first cause of action and paragraphs II and III of the second cause of action are incorporated herein and by reference are made a part hereof as fully as though set [18] forth at length.

II.

That in or about the month of August, 1950, plaintiffs entered into a contract with the Griesedieck Western Brewery Co. whereby plaintiffs agreed to devote themselves exclusively to acting as said company's agents, representatives and distribu-

tors of said company's products, namely Stag beer and Hyde Park "75" beer in the area of the Western United States and more particularly in the States of California, Arizona and Nevada, and said company agreed to supply plaintiffs with Stag beer and Hyde Park "75" beer as ordered by plaintiffs at agreed upon wholesale prices and did agree to act through plaintiffs as its sole agents, representatives and distributors in said area; that said contract could be terminated only by one of the parties giving the other party one year's notice of termination.

III.

That defendant Carling did unlawfully interfere with said contract by persuading, influencing, forcing and inducing said Griesedieck to terminate said contract without giving plaintiffs the agreed one year's notice of termination; that as a result of said persuasion, influence, force and inducement by said defendant Carling, the said defendant Griesedieck did, on or about October 28, 1954, fail and refuse to honor plaintiffs' orders for said company's products, namely, Stag beer and Hyde Park "75" beer, and did fail and refuse to give plaintiffs any notice of termination of said contract; that said Griesedieck did thereby fail and refuse to perform its obligations under said contract with plaintiffs as a direct result of the interference by defendant Carling.

IV.

That defendant Carling, although having no interest or [19] right whatsoever in said contract, did

take it upon itself to notify plaintiffs on the 28th day of October, 1954, that said contract was terminated as of October 31, 1954, and would not be further honored by said company.

V.

That as a result of said unlawful interference by defendant Carling with plaintiff's contractual rights with said company, plaintiff was damaged in the sum of $750,000.00.

VI.

That defendant Carling unlawfully interfered with said contractual rights of plaintiffs with said defendant Griesedieck for the sole and exclusive purpose of obtaining for itself the right to sell its product, namely, Carling Black Label Beer, in the area in which plaintiffs represented said company without competition from plaintiffs or Stag or Hyde Park "75" beers.

VII.

That because of the unwarranted and unlawful interference by defendant Carling with plaintiffs' contractual rights with said Griesedieck and plaintiffs' damage resulting therefrom, plaintiffs should be awarded punitive damages against defendant Carling in the amount of $375,000.00.

Wherefore, plaintiffs pray judgment against defendants and each of them as follows:

1. For damages for breach of contract and fraud in the amount of $750,000.00;

2. For punitive damages in the sum of $375,-

000.00 because of defendant Carling Company's interference with plaintiffs' contractual rights with defendant Griesedieck Western Brewery Co.;

3. For costs of suit herein incurred; and

4. For such other and further relief as to this court [20] may seem just and proper.

THOMAS A. WOOD,
LARWILL AND WOLFE,

/s/ By CHARLES W. WOLFE,
Attorneys for Plaintiffs [21]

Office of the Secretary of State,
State of California, Sacramento 3

March seventeenth, 1955

Griesedieck Western Brewery Co.
1201 West E Street
Belleville, Illinois

Re: William LeVecke, et al., vs. Griesedieck Western Brewery Co., et al.; Superior Court, Los Angeles County; No. 640630

Gentlemen:

The enclosed copies of process in the above action were delivered to the undersigned March 10th for the purpose of serving your corporation.

Section 6503, Corporations Code, provides that a corporation served in this manner must appear and answer within thirty days after the delivery of the

copies to the Secretary of State or an Assistant or Deputy.

Yours very truly,

Frank M. Jordan,
Secretary of State

By .....
Deputy Secretary of State

e enc reg air rrr [22]

[Title of Superior Court and Cause.]

ORDER FOR SERVICE OF DEFENDANT GRIESEDIECK WESTERN BREWERY CO. BY SERVING SECRETARY OF STATE OF CALIFORNIA

Upon reading the affidavit of William LeVecke, one of the plaintiffs in the above entitled action, and it satisfactorily appearing therefrom that the defendant Griesedieck Western Brewery Co. cannot, after due diligence, be found within the State of California, and it further appearing that the said defendant has not designated an agent for service of process in the State of California and has no officer or agent in the State of California upon whom service of process can be made, and it further appearing that a summons has been duly issued out of the above entitled court in this action and that service cannot be made upon said defendant corporation in this State for the reasons hereinabove stated and by said affidavit made to appear, and the address of the defendant [23] Griesedieck Western

Brewery Co. appearing to be 1201 West "E" Street, Belleville, Illinois, and on motion of the plaintiffs,

It Is Hereby Ordered that service of summons and complaint in the above entitled action shall be made upon said defendant Griesedieck Western Brewery Co. by personal delivery of the summons and complaint in the above entitled action, together with a copy of this Order, to the Secretary of State or to an assistant or deputy Secretary of State of California.

Dated this 1st day of March, 1955.

/s/ RICHARDS,
Judge of the Superior Court [24]

[Endorsed]: Filed March 29, 1955.

[Title of District Court and Cause.]

NOTICE OF MOTION AND MOTION TO SET ASIDE, VACATE, AND QUASH SERVICE OF SUMMONS AND COMPLAINT AND NOTICE OF MOTION AND MOTION TO DISMISS

To the Plaintiffs Above Named and to Messrs. Larwill & Wolfe, and Thomas A. Wood, Esquire, 1017 Citizens National Bank Building, Los Angeles 13, California, their attorneys, and To Whomsoever It May Concern:

You and Each of You Will Please Take Notice that the defendant The Griesedieck Company, a cor-

poration, appearing specially and solely for the purpose of making these motions, notice of which is given herewith, will, on Monday, April 18, 1955, at the hour of 10:00 o'clock a.m., of said day, or as soon thereafter as counsel may be heard, in the court room of the Honorable Peirson M. Hall, [25] Judge of the above named Court, in the United States Post Office and Court House Building, Los Angeles 12, California, move the above named Court as follows:

1. To dismiss the action, and each cause of action thereof or in lieu thereof to quash the summons and the return of service of summons attempted to be effected upon The Griesedieck Company by serving the Secretary of State of the State of California for the reason that this Court has no jurisdiction over the person of this defendant.

2. To dismiss the action, and each cause of action thereof or in lieu thereof to quash the summons and the return of service of summons attempted to be effected upon The Griesedieck Company by serving the Secretary of State of the State of California for the reason that such attempted service of process was and is insufficient.

3. To dismiss the action, and each cause of action thereof or in lieu thereof to quash the summons and the return of service of summons attempted to be effected upon The Griesedieck Company by serving the Secretary of State of the State of California for the reason that such attempted service of process was and is in violation of due process.

Said motion will be based upon (a) the summons;

(b) the complaint of the plaintiffs on file herein; (c) the return of service of summons, if such return shall have been made by the plaintiffs at the time of the hearing on this motion; (d) the order for service of defendant Griesedieck Western Brewery Co. by serving Secretary of State of California; (e) the memorandum of points and authorities served and filed herewith; (f) the affidavits of Edward D. Jones, Henry G. Sewing, Jr., Melvin B. Feig, and August L. Griesedieck, hereto affixed as Exhibits "1," "2," "3," and "4," respectively; [26] (g) this notice of motion; and (h) all other papers, files, and records on file in the above entitled action at the time said motion is heard.

Dated: April 4, 1955.

SHEPPARD, MULLIN, RICHTER & BALTHIS,
JAMES C. SHEPPARD,
EDWIN H. FRANZEN,
/s/ CAMERON W. CECIL,
Attorneys for Defendants [27]

EXHIBIT No. 1

AFFIDAVIT IN SUPPORT OF MOTION BY DEFENDANT THE GRIESEDIECK COMPANY

State of Missouri,
City of St. Louis—ss.

Edward D. Jones, being first duly sworn, on his oath says:

1. I reside at 6341 Ellenwood Avenue, St. Louis

County, Missouri. I am President of The Griesedieck Company, formerly Griesedieck Western Brewery Company, and I have been the Chief Executive Officer of said corporation from 1944 to date and at all times referred to in the complaint. During said period I held the offices of President and Chairman of the Board of said corporation. I have personal knowledge of the facts stated herein.

2. The Griesedieck Company is a corporation organized and existing under the laws of the State of Illinois and is licensed to do business as a foreign corporation in the State of Missouri. It is not now and never has been qualified under the laws of the State of California to do business within said State. Prior to November 1, 1954, and at all times referred to in the complaint, the corporation, under the name of Griesedieck Western Brewery Company, was engaged in manufacturing and selling beer from its brewery and offices in Belleville, Illinois, and from its brewery and offices in the City of St. Louis, Missouri. On November 1, 1954, this defendant sold and transferred to Carling Brewing Company Incorporated, for cash, all of its brewing assets, equipment, real estate, plants and inventory. It has not engaged in the brewing business at any time thereafter.

3. This defendant has never done business within the State of California. It has never held a license to sell, [28] import or otherwise engage in the beer business within said state. The only business it has ever done with respect to purchasers located in the State of California was done prior to November 1,

1954, and in the course of interstate commerce with two purchasers. That business consisted of the receipt and acceptance in Belleville, Illinois, or in St. Louis, Missouri of orders from the plaintiffs and from Drexel Distributing Company, both located in California, and the filling of said orders by the shipment of its products by railroad common carrier from its plant in Illinois or from its plant in Missouri to said purchasers residing in California. All such shipments originated at either of the company's two plants outside California and such sales were made and billed f.o.b. this defendant's plants. On all sales made by this defendant to the two purchasers in California the title to the merchandise passed to the purchaser at the time of delivery by this defendant to the railroad carrier in Illinois or in Missouri. All invoices and statements relating to such sales were mailed from this company's offices in Illinois or in Missouri direct to the purchasers.

4. At all times referred to in the complaint, the plaintiffs owned and operated their own wholesale beer business within the State of California. The plaintiffs, as a wholesaler and independent distributor of this defendant's products in California, sold beer to such wholesale and retail outlets as they chose to obtain. The plaintiffs purchased beer from this defendant as principals on their own account and were billed for all such purchases at time of shipment, paying the wholesale price therefor. The plaintiffs were responsible for, and paid to the carrier, all transportation charges from point [29] of origin to destination of the shipment. The plaintiffs

resold on their own account the beer which they had purchased from this defendant; they had sole responsibility for fixing prices on sales by them and for the billing and collection of their accounts, without any control or supervision by this company. This company did not require the plaintiffs to maintain any records for it, to collect any data, or to file any reports with it with respect to the plaintiff's operation of their said business or with respect to their disposition of the beer sold by this defendant to them.

5. Upon the sale and conveyance of all its operating assets on November 1, 1954, this company in fact went out of the brewing business. Its entire brewing business ceased on October 31, 1954, including the business in interstate commerce which this company had done prior to November 1, 1954, with the two purchasers residing in California. This company has not sold or shipped any beer to purchasers in California or elsewhere, or done any other act relating thereto, from November 1, 1954, to date.

6. Neither of the plaintiffs was ever an officer or employee of this company. Neither plaintiff ever received a salary, an expense account or other personal compensation from this defendant. The plaintiffs were paid an independent distributor's commission on the sales made in interstate commerce by this defendant to Drexel Distributing Company in California, which purchaser had been obtained by the plaintiffs. The commission arrangement with respect to sales to Drexel Distributing Company,

which was the only other customer of this company in California, was made at plaintiffs' request.

7. This defendant has never done any of the following acts: [30]

(a) Maintained an office or place of business in the State of California;

(b) Owned or leased any real estate in the State of California;

(c) Owned, leased or operated any personal property in the State of California;

(d) Maintained or leased a warehouse in the State of California;

(e) Maintained an inventory or stock of goods in the State of California;

(f) Had any salesmen or other employees working within the State of California or soliciting orders in said State;

(g) Advertised by newspaper, radio, television, billboards or in any other manner within the State of California; any advertising within California of this defendant's products was done by the plaintiffs;

(h) Authorized the listing of its corporate name in any telephone or other directory published within the State of California;

(i) Been assessed any taxes by the State of California or paid any to said State;

(j) Applied for or received any licenses or permits from the State of California for the purpose of manufacturing, selling, importing or otherwise engaging in its business within said State;

(k) Listed a California office or agent on its stationery;

(l) No officer or employee of this company ever resided in California during such employment;

(m) Shipped to the plaintiffs or to anyone else in California on a consignment basis; [31]

(n) Shipped its products to California in equipment owned or leased by it;

(o) Made local deliveries within California of its products;

(p) Maintained a bank account in the State of California;

(q) Made collections or received any payments for its merchandise within the State of California;

(r) Made any purchases within California of goods or supplies;

(s) Lent any money to the plaintiffs or to any of their customers within the State of California;

(t) Entered into any contracts or solicited any orders within the State of California.

/s/ EDWARD D. JONES

Subscribed and sworn to before me, a Notary Public in and for the City of St. Louis, Missouri, this 30th day of March, 1955.

[Seal] /s/ BETTY PROCTOR,
Notary Public [33]

EXHIBIT No. 2

AFFIDAVIT IN SUPPORT OF MOTION BY DEFENDANT THE GRIESEDIECK COMPANY

State of Missouri,
City of St. Louis—ss.

Henry G. Sewing, Jr., being first duly sworn, on his oath says:

1. I reside at 2970 Ridgeview Drive, St. Louis County, Missouri. I was the Merchandising Manager of the Griesedieck Western Brewery Company (now named The Griesedieck Company) from February, 1952, to November 1, 1954; I was the Sales Manager of the Hyde Park Division of Griesedieck Western Brewery Company from July 1, 1950, to February, 1952. I had supervision of all sales made by this company to the plaintiffs and to Drexel Distributing Company at all times referred to in the complaint. I have personal knowledge of the facts stated herein.

2. The company has never maintained a sales office in California. It has never had a salesman working within California or soliciting orders in said state. The company has never advertised its products within the State of California. From time to time, the company sold or furnished the plaintiffs various items of point-of-purchase advertising material. These accompanied merchandise being shipped to plaintiffs by railroad carrier, and title to all such material passed to plaintiffs upon de-

livery to the carrier in Missouri or Illinois. The subsequent use of the material in California by the plaintiffs was at their sole discretion.

3. From July, 1950, to October 31, 1954, all orders that were received by this company from purchasers situated in California came under my supervision. There were only two customers in California who purchased merchandise from the [34] company: The LeVecke Company (formerly described as The LeVecke Distributing Company) and Drexel Distributing Company. All the orders received from these two purchasers were subject to acceptance by the seller at its offices in St. Louis or in Belleville. All such orders first were subject to the approval of the Sales Department, which procedure was done under my supervision. Said orders were also subject to approval by the Credit Department, which was under the supervision of Melvin B. Feig who was Credit Manager of the company throughout said period. Final acceptance of the orders was made by shipment of the merchandise by railroad carrier to the purchaser, f.o.b. this company's plants. At time of shipment an invoice was mailed to the purchaser for payment of the entire purchase price. The purchaser took title upon delivery to the railroad and assumed all risk of loss. No shipments were ever made to the plaintiffs or to anyone else in California on a consignment basis.

4. Purchase Order No. 264 of the LeVecke Company dated June 10, 1954, which is attached as Exhibit A to this affidavit, is an actual order received by the company from the plaintiffs in June,

1954, and it is truly representative of the manner in which the plaintiffs purchased beer from said company. The form entitled "Distributor Purchase Order" dated June 11, 1954, which is attached as Exhibit B to this affidavit is the form used by the company in approving the purchase order referred to above. Approval by both the Sales Department and by the Credit Department of the company were necessary for the acceptance by it of the order. The bill of lading dated June 16, 1954, which is attached as Exhibit C to this affidavit, is an actual copy of the bill of lading sent [35] to the plaintiffs at the time of acceptance of their purchase order referred to above, by shipment of the merchandise. The invoice dated June 16, 1954, which is attached as Exhibit D to this affidavit, is an actual copy of the original invoice which was mailed to the plaintiffs in the ordinary course of business upon shipment of the goods described in the bill of lading.

5. The receipt of the order from the plaintiffs through the mail from California, the approval of the order by the Sales Department and by the Credit Department, the acceptance of the order by shipment of the goods and the billing for the purchase price, all as shown by these exhibits A, B, C and D, are truly representative of the manner in which all sales of its merchandise to the plaintiffs were handled by said company during the period referred to in the complaint.

6. Purchase Order No. 55855 of Drexel Distributing Company, dated July 1, 1954, which is attached as Exhibit E to this affidavit, is an actual

order received by the company through the mail from Drexel Distributing Company in July, 1954. The exhibit is truly representative of the manner in which all orders were received from that purchaser. The form entitled "Distributor Purchase Order," dated July 6, 1954, which is attached as Exhibit F to this affidavit, is the form used by the seller in approving the purchase order referred to above. Approval of both the Sales Department and the Credit Department of the company were necessary for the acceptance by it of the order. The bill of lading dated July 13, 1954, which is attached as Exhibit G to this affidavit, is an actual copy of the bill of lading sent to Drexel Distributing Company at the time of the acceptance of its purchase order referred [36] to above, by delivery of the merchandise to railroad carrier for shipment to said purchaser. The invoice dated July 13, 1954, which is attached as Exhibit H to this affidavit, is an actual copy of the original invoice which was mailed to Drexel Distributing Company in the ordinary course of business upon shipment of the goods described in the bill of lading.

7. The receipt of the order from Drexel Distributing Company through the mail from California, the approval of the order by the Sales Department and by the Credit Department of the company, the acceptance by delivery of the goods to the railroad carrier for shipment to the purchaser and the billing for the purchase price, all as shown by these exhibits E, F, G and H, are truly representative of the manner in which all sales of its merchandise

to Drexel Distributing Company were handled by said company during the period referred to in the complaint.

/s/ HENRY G. SEWING, JR.

Subscribed and sworn to before me, a Notary Public in and for the City of St. Louis, this 31st day of March, 1955.

[Seal] /s/ FRED E. HELLER,
Notary Public [38]

PHONE VA. 7944

SELLER'S COPY

PURCHASE ORDER

The LeVecke Company

No. 264

1807 EAST OLYMPIC BOULEVARD
LOS ANGELES 21, CALIFORNIA

THIS ORDER NUMBER MUST APPEAR ON INVOICE

DATE June 10 1954

TO Griesedieck Western Brewery Company

ADDRESS 3607 North Florissant
Saint Louis 7, Missouri

GENTLEMEN: BEING GOVERNED BY INSTRUCTIONS HEREON, PLEASE ENTER OUR ORDER FOR THE FOLLOWING:

SHIP TO	WHEN	ROUTING	CONFIRMING
The LeVecke Company	at once	Wabash-Santa Fe	

QUANTITY	UNIT	PACK & SIZE	DESCRIPTION	PRICE	UNIT
1250	48	12	Hyde Park Beer - 8/6 cans		

ORDERS TO BE EFFECTIVE MUST BE MADE OUT ON THIS FORM AND BEAR AN AUTHORIZED SIGNATURE

BY Reed J. LeVecke

39

DISTRIBUTOR PURCHASE ORDER

HYDE PARK

GRIESEDIECK WESTERN BREWERY COMPANY
BELLEVILLE, ILLINOIS — ST. LOUIS, MISSOURI

Date 6/11/54

Ordered by: The LeVecke Co.
Los Angeles, Calif.

Ship to: The LeVecke Co.
1807 E. Olympic Blvd.
Los Angeles, Calif.

Customer Order No. 264 Requested Shipping Date: AT ONCE

Routing: WABASH - SANTA FE

Special Instructions

STAG PACKAGE BEER	NUMBER OF PALLETS				TOTAL CASES
% Export Bottles, 24/12 oz.	42		49		
% Export Bottles, 36/7 oz.	42		56		
% Flat Top Cans, 8/6 Pack	35		42		1250
% Flat Top Cans, 12/4 Pock	35		42		
% Flat Top Cans, 24/12 oz.	70		77		
% Flat Top Cans, 12/12 oz.	140		154		
% One Way, 4/6 Pack	49		56		
% One Way, 12/12 oz.	98		112		
% One Way Quarts, 12/32 oz.	35		42		
% Export Bottles, 24/12 oz.	42		49		
% Export Bottles, 36/7 oz.	42		56		
% Flat Top Cans, 8/6 Pack	35		42		
% Flat Top Cans, 12/4 Pock	35		42		
% Flat Top Cans, 24/12 oz.	70		77		
% Flat Top Cans, 12/12 oz.	140		154		
% One Way, 4/6 Pack	49		56		
% One Way, 12/12 oz.	98		112		
% One Way Quarts, 12/32 oz.	35		42		

DO NOT WRITE IN SPACE BELOW

SALES DEPARTMENT APPROVAL

By Lucille O'Neill

CREDIT DEPARTMENT APPROVAL

By

TERMS:

No. 381

STAG DRAUGHT BEER

Barrels Golden Gate	3.2% Barrels Golden Gate
Half Barrels Golden Gate	3.2% Half Barrels Golden Gate
Half Barrels Peerless Tap	3.2% Half Barrels Peerless Tap
Quarter Barrels Golden Gate	3.2% Quarter Barrels Golden Gate

NAME BY

CREDIT DEPARTMENT

40

38

Form 113-A

Printed in U. S. A.

(For use in connection with Uniform Domestic Straight Bill of Lading, adopted by Carriers in Official, Southern, Western and Illinois Classification Territories, March 16, 1925, as amended August 1, 1936, and June 16, 1941.) 2nd Sheet

WABASH

THIS SHIPPING ORDER

must be legibly filled in, in ink, in indelible pencil, or in carbon and retained by the Agent.

Shipper's No.

Agent's No. # 264

WABASH RAILROAD COMPANY

RECEIVE, subject to the classifications and tariffs in effect on the date of the issue of this Shipping Order,

At St. Louis, Mo. June 16 1954, 19 From Friendsdick extern Brewery Co. Inc

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

Mail or street address of consignee—For purposes of notification only. (1907 West Lawlis, Blvd.)

Consigned to The Novecke Distributing Co.

Destination Los Angeles State of California County of

Route Through Santa Fe

Delivering Carrier Car Initial Car No. 2606

No. Pkgs.	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*Weight (Subject to Correction)	Class or Rate	Check Col.
1250	Cases Beer, 48/12 oz. Int top cans in F C fibre cartons(8/6 pack) H	60,750	lbs.	
	B.A.T. No: 151930-151931			
	This shipment is accepted under the provisions of rule 49 Consolidated Freight Classification or Uniform Freight Classification permit No. 2815 Consolidated Classification Committee			

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement.

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

Friendsdick extern Brewery Co. Inc

(Signature of Consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per (The signature here acknowledges only the amount prepaid.)

Charges Advanced: $

This Shipment is correctly described

Correct weight is 60,750 lbs.

Subject to Section 7 of the conditions of the UNIFORM BILL OF LADING according to the Agent's or Carrier's estimate of the 4836

NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding per

Friendsdick extern Brewery Co. Inc Shipper.

Per Agent

Permanent postoffice address of shipper 3647 No. Florissant Ave. St. Louis, Mo.

Agent must detach and retain this Shipping Order and must sign the Original Bill of Lading.

CON. P. CURRAN PRINTING CO., ST. LOUIS, MO.

41

-15- EXHIBIT "C"

1
2
3
4

[illegible]

[illegible]

[illegible]yde ark Lunt [illegible]t. ouis, o.
June 16 1954

Cer: The LeVeche istributin Co.
G A R K 1307 East Olympic Blvd.
90686 os ngeles, 21 Calif.

C 577 H P

[illegible]bash-Santa Fe. R. of I. 264

1250 Chess Men, 4[illegible]/12 oz. Flat top crns (9/6 mod) H $ 4.18) 5,[illegible].0

42

27
28
29
3

Sheppard Mullin Richter & Hampton

DREXEL DISTRIBUTING COMPANY
DIVISION OF BEVERAGE DISTRIBUTORS, INC.
609 SUTTER STREET
SAN FRANCISCO 2, CALIFORNIA

SELLER'S COPY
INVOICE US IMMEDIATELY

PURCHASE ORDER

No. 55855

DATE July 1, 1954

TO. (SELLER): Griesedieck Western Brewery Company
3607 North Florissant Ave,
Saint Louis 18, ~~Mo~~ Miss.

DISCOUNT
CASH
TRADE
ALLOWANCES

SHIP TO: (CONSIGNEE) Drexel Distributing Company
320 Market Street,
Los Angeles 12, Calif.

CONSIGNEE'S ORDER NUMBER

CHARGE ACCT NO.

SHIP ON	TO ARRIVE ABOUT	SHIPPING POINT	FREIGHT ALLOWED TO	TOTAL WEIGHT
	7/19			

SHIP VIA: Wabash-Santa Fe

SECOND FOLD HERE

QUANTITY	UNIT	PACK AND SIZE	DESCRIPTION	CODE NUMBER	PRICE	PER
175	cs	12/32	Hyde Park Beer - 1-way			
950	cs	8/6/12	Hyde Park Beer - cans			
195	cs	8/6/12	STAG Beer - cans			

FIRST FOLD HERE

INSTRUCTIONS DO NOT INSURE FOR OUR ACCOUNT SHOW ABOVE PURCHASE ORDER NUMBER ON INVOICE AND ALL SHIPPING PAPERS SEND ORIGINAL BILL OF LADING TO CONSIGNEE AND CONFIRM TO US BY COPY OF B/L OR OTHER SHIPPING PAPERS

DREXEL DISTRIBUTING COMPANY
DIVISION OF BEVERAGE DISTRIBUTORS, INC.
(BUYER)

BY A. Iannuzzi
BRANCH OFFICE

THIS ORDER IS ISSUED BY BUYER SUBJECT TO AND UPON THE TERMS AND CONDITIONS PRINTED ON THE REVERSE SIDE HEREOF
FINE ART SHEET

FORM NO 82-12-52-125-20 PRINTED IN U.S.A.

43

pard,
Richter
elchin

EXHIBIT "E"

DISTRIBUTOR PURCHASE ORDER

STAG

GRIESEDIECK WESTERN BREWERY COMPANY
BELLEVILLE, ILLINOIS — ST. LOUIS, MISSOURI

Date 7/6/54

red by: The LeVecke Co.
1807 E. Olympic Blvd.
Los Angeles, Calif.

Ship to: Drexel Dist. Co.
320 Market Street
Los Angeles, Calif.

mer Order No. 55855 Requested Shipping Date: TO ARRIVE JULY 19th

g: WABASH SANTA FE

l Instructions

STAG PACKAGE BEER		NUMBER OF PALLETS		TOTAL CASES
xport Bottles, 24/12 oz.	42		49	
xport Bottles, 36/7 oz.	42		56	
at Top Cans, 8/6 Pack	35		42	175
ot Top Cans, 12/4 Pack	35		42	
at Top Cans, 24/12 oz.	70		77	
at Top Cans, 12/12 oz.	140		154	
ie Way, 4/6 Pack	49		56	
ie Way, 12/12 oz.	98		112	
e Way Quarts, 12/32 oz.	35		42	
xport Bottles, 24/12 oz.	42		49	
xport Bottles, 36/7 oz.	42		56	
at Top Cans, 8/6 Pack	35		42	
at Top Cans, 12/4 Pack	35		42	
at Top Cans, 24/12 oz.	70		77	
at Top Cans, 12/12 oz.	140		154	
ie Way, 4/6 Pack	49		56	
ie Way, 12/12 oz.	98		112	
ie Way Quarts, 12/32 oz.	35		42	

DO NOT WRITE IN SPACE BELOW

SALES DEPARTMENT APPROVAL

By Lucille O'Neill

CREDIT DEPARTMENT APPROVAL

By ~~MMC~~

TERMS: R of I

Invoice Drexel Dist. Co.
San Francisco Calif

No. 411

STAG DRAUGHT BEER

els Golden Gate		3.2% Barrels Golden Gate	
Barrels Golden Gate		3.2% Half Barrels Golden Gate	
Barrels Peerless Tap		3.2% Half Barrels Peerless Tap	
ter Barrels Golden Gate		3.2% Quarter Barrels Golden Gate	

E BY

CREDIT DEPARTMENT

44

Form 113-A

(For use in connection with Uniform Domestic Straight Bill of Lading, adopted by Carriers in Official, Southern, Western and Illinois Classification Territories, March 16, 1923, as amended August 1, 1930, and June 19, 1941.)

Printed in U. S. A. 3rd Sheet

THIS MEMORANDUM

It an acknowledgment that a bill of lading has been issued and is not the Original Bill of Lading nor a copy or duplicate covering the property named herein, and is intended solely for filing or record.

Shipper's No.

Agent's No.

WABASH RAILROAD COMPANY

RECEIVED, subject to the classifications and tariffs in effect on the date of the receipt by the carrier of the property described in the Original Bill of Lading,

at St. Louis, Mo. July 13 1936, 19 From [illegible]

The property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

Consigned to [illegible]

(Mail or street address of consignee—For purposes of notification only.)

Destination [illegible] State of [illegible] County of

Route [illegible]

Delivering Carrier Car Initial [illegible] Car No. 8104

No. Pkgs.	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*Weight (Subject to Correction)	Class or Rate	Check Col.
95	[illegible]	46,175 lbs.		
175	[illegible]	7,035 "		
175	[illegible]	8,615 "		
		61,825 "		
6	[illegible]	6 "		

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:
The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

[illegible]

(Signature of Consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per (The signature here acknowledges only the amount prepaid.)

Charges Advanced: $

Shipment is correctly described as 61,825 lbs.

This shipment is routed under the provisions of rule 49 [illegible] rate application number 1125

*Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property. The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding per

[illegible] Shipper.

Per Agent.

Permanent postoffice address of shipper 3627 No. Florissant Rd. St. Louis, Mo.

CON. P. CURRAN PRINTING CO. ST. LOUIS, MO.

Form No. 11.4--10M-1-54

INVOICE

GRIESEDIECK WESTERN BREWERY CO.

BELLEVILLE, ILLINOIS

103 YEARS CONTINUOUS BUSINESS 1851-1954

[illegible] Plant

SOLD TO

C [illegible]

[illegible] Co.

[illegible] R X [illegible] Blvd., Calif.

July 13 [illegible]954

[illegible]

C 577 E P

SHIP VIA [illegible] TERMS: [illegible] of I. ORDER No. 55[illegible]

QUANTITY		Container Deposit	BEER	TOTAL
175	Cases Beer, 48/12 oz. Flat top cans(8/6 pack) Stag		$ 4.72	$ 826.00

46

We the undersigned, do hereby guarantee that the articles listed herein are not adulterated or misbranded within the meaning of the Federal Food and Drugs Act, June 30, 1906, as amended.

GRIESEDIECK WESTERN BREWERY CO [illegible]

Sheppard, Mullin, Richter & Hampton

EXHIBIT "H"

EXHIBIT No. 3

AFFIDAVIT IN SUPPORT OF MOTION BY DEFENDANT THE GRIESEDIECK COMPANY

State of Missouri,
City of St. Louis—ss.

Melvin B. Feig, being first duly sworn, on his oath says:

1. I reside at Collinsville, Illinois. I was the Credit Manager of the Griesedieck Western Brewery Company (now named the Griesedieck Company) from 1949 to November 1, 1954, and at all times referred to in the complaint of William LeVecke, et al. I have personal knowledge of the facts stated herein.

2. During said period all orders that were received by the company from purchasers situated in California came under my supervision as Credit Manager. There were only two customers in California who purchased merchandise from the company: The LeVecke Company (formerly described as The LeVecke Distributing Company) and Drexel Distributing Company. All purchase orders from these two purchasers were subject to acceptance by this company at its offices in St. Louis or in Belleville. All said orders had to receive the approval of the Sales Department and the approval of the Credit Department of the company before acceptance. The approval by the Credit Department was given under my supervision as Credit Manager.

Final acceptance of the orders was made by delivery of the merchandise to the railroad carrier for shipment to the purchaser, f.o.b. this company's plants. At time of shipment an invoice was mailed from St. Louis or Belleville to the purchaser in California for payment of the entire purchase price. No shipments were ever made to the plaintiffs or to anyone else in California on a consignment basis.

3. I have read the affidavit of Henry G. Sewing, Jr., dated March 31, 1955, relating to these matters and examined Exhibits A, B, C, D, E, F, G and H to said affidavit. The statements made therein by said affiant in regard to those exhibits [47] are correct. Exhibits A, B, C, D, E, F, G and H to the affidavit of Henry G. Sewing, Jr., filed herewith, truly represent the manner throughout the period referred to in the complaint of William LeVecke et al. in which the purchase orders were:

(a) received by mail from the plaintiffs and from Drexel Distributing Company;

(b) processed for approval by the Sales Department and by the Credit Department of the company;

(c) accepted by delivery of the goods to the railroad carrier for shipment to the purchaser;

(d) billed to the purchasers for the purchase price.

/s/ MELVIN B. FEIG

Subscribed and sworn to before me, a Notary Public in and for the City of St. Louis, Missouri, this 31st day of March, 1955.

[Seal] /s/ BETTY PROCTOR,
Notary Public [49]

EXHIBIT No. 4

AFFIDAVIT IN SUPPORT OF MOTION BY DEFENDANT THE GRIESEDIECK COMPANY

State of Missouri,
City of St. Louis—ss.

August L. Griesedieck, being first duly sworn, on his oath says:

1. I reside at 6900 West Main Street, Belleville, Illinois. I am Secretary of The Griesedieck Company, formerly named Griesedieck Western Brewery Company, and I have been the Secretary of said corporation from November 1, 1954, to date. I have personal knowledge of the facts stated herein.

2. On March 21, 1955, this corporation received at its office address at Belleville, Illinois, by registered mail from Frank M. Jordan, Secretary of State of the State of California, the following papers:

(a) Copy of order for service of defendant Griesedieck Western Brewery Company by serving Secretary of State of California, said order dated March 1, 1955, being entered in cause No. 640630

in the Superior Court of the State of California in and for the County of Los Angeles.

(b) Copy of summons issued by the Clerk of said Court in said cause and directed to Griesedieck Western Brewery Company, a corporation.

(c) Copy of complaint of William LeVecke and Reed LeVecke in said cause.

(d) Letter dated March 17, 1955, from the said Frank M. Jordan, Secretary of State of California, addressed to Griesedieck Western Brewery Company, stating that the papers enclosed with the letter were delivered to said Secretary of State on March 10, 1955, for the purpose of serving the corporation. [50]

3. No service of summons or process of any kind in said cause No. 640630 has been made on this corporation or upon any of its officers or agents, other than the attempted service by delivery of the papers in the manner described in paragraph two above.

/s/ AUGUST L. GRIESEDIECK

Subscribed and sworn to before me, a Notary Public in and for the City of St. Louis, Missouri, this 1st day of April, 1955.

[Seal] /s/ BETTY PROCTOR,
Notary Public [52]

Affidavit of Service by Mail attached. [53]

[Endorsed]: Filed April 4, 1955.

[Title of District Court and Cause.]

NOTICE OF MOTION AND MOTION TO SET ASIDE, VACATE, AND QUASH SERVICE OF SUMMONS AND COMPLAINT AND NOTICE OF MOTION AND MOTION TO DISMISS

To the Plaintiffs Above Named and to Messrs. Larwill & Wolfe, and Thomas A. Wood, Esquire, 1017 Citizens National Bank Building, Los Angeles 13, California, their attorneys, and To Whomsoever It May Concern:

You and Each of You Will Please Take Notice that the defendant Carling Brewing Company Incorporated, a corporation, appearing specially and solely for the purpose of making these motions, notice of which is given herewith, will on Monday, April 25, 1955, at the hour of 10:00 o'clock a.m., of said day, or as soon thereafter as counsel may be heard, in the court room of the Honorable Leon R. Yankwich, Judge of the above named Court, in the United States Post [54] Office and Court House Building, Los Angeles 12, California, move the above named Court as follows:

1. To dismiss the action, and each cause of action thereof or in lieu thereof to quash the summons and the return of service of summons attempted to be effected upon Carling Brewing Company Incorporated by serving K. W. Burrie, the regional representative of the defendant Carling Brewing Com-

pany Incorporated for the reason that this Court has no jurisdiction over the person of this defendant.

2. To dismiss the action, and each cause of action thereof or in lieu thereof to quash the summons and the return of service of summons attempted to be effected upon Carling Brewing Company Incorporated by serving K. W. Burrie, the regional representative of the defendant Carling Brewing Company Incorporated for the reason that such attempted service of process was and is insufficient.

3. To dismiss the action, and each cause of action thereof or in lieu thereof to quash the summons and the return of service of summons attempted to be effected upon Carling Brewing Company Incorporated by serving K. W. Burrie, the regional representative of the defendant Carling Brewing Company Incorporated for the reason that such attempted service of process upon a purported cause of action in no way connected with any business done by said defendant in California was and is in violation of due process.

Said motion will be based upon (a) the summons; (b) the complaint of the plaintiffs on file herein; (c) the return of service of summons, if such return shall have been made by the plaintiffs at the time of the hearing on this motion; (d) the memorandum of points and authorities served and filed herewith; (e) the affidavits of Ian R. Dowie and H. R. Trees, hereto affixed as Exhibits "1" and "2", respectively; (f) this notice of motion; and (g) all

other papers, files, and records on file in the above entitled action at the time [55] said motion is heard.

Dated: April 11, 1955.

SHEPPARD, MULLIN, RICHTER
& BALTHIS
JAMES C. SHEPPARD
EDWIN H. FRANZEN

/s/ CAMERON W. CECIL
Attorneys for Defendants [56]

EXHIBIT No. 1

AFFIDAVIT OF IAN R. DOWIE

State of Ohio,
Cuyahoga County—ss.

Ian R. Dowie, being first duly sworn on his oath says:

1. I reside at 2360 Delamere Drive, Cleveland Heights, Cuyahoga County, Ohio. I am President of the Carling Brewing Company and I have been the chief executive officer of said corporation from 1951 to date and at all times referred to in the Complaint. I have personal knowledge of the facts stated herein.

2. The Carling Brewing Company is a corporation organized and existing under the laws of the State of Virginia and is licensed to do business as a foreign corporation in the State of Ohio, in which state at 9400 Quincy Avenue, Cleveland, it

has for many years, including all times referred to in the Complaint, maintained its principal offices. For many years prior to November 1, 1954, including all times referred to in the Complaint, and at the present time, Carling Brewing Company has engaged in the manufacturing and selling of beer from its brewery also located at 9400 Quincy Avenue, Cleveland, Ohio. On November 1, 1954, Carling Brewing Company acquired by purchase from The Griesedieck Company (at said time by name The Griesedieck Western Brewery Company) all of said corporation's brewing assets, equipment, real estate, plants and inventory. Since November 1, 1954, (the date of said acquisitions) Carling Brewing Company has also engaged in manufacturing and selling beer from its brewery and offices in Belleville, Illinois and St. Louis, Missouri, respectively.

3. At no time mentioned in the Complaint, nor at the present time, has Carling Brewing Company, directly or indirectly, sold any of its merchandise to the plaintiffs, or to any other persons, firms or corporations in the State of California or elsewhere through the plaintiffs. All business done by [57] Carling Brewing Company with respect to purchasers located in the State of California was in the course of interstate commerce and in the manner hereinafter stated.

4. Orders from purchasers in California for merchandise manufactured by Carling Brewing Company are placed with Carling Brewing Company upon written order blanks and are subject to ac-

ceptance only at Cleveland, Ohio. A copy of said order blank is attached hereto marked Exhibit "A" and made a part hereof. Prior to November 1, 1954, at all times since, and at the present time all shipments of merchandise destined for California originated at said Company's Cleveland, Ohio, Plant and such sales were and are made and billed f.o.b. Cleveland, Ohio.

Title to merchandise of Carling Brewing Company sold to California purchasers passes to such purchasers at the time of delivery by said defendant to the railroad carrier in Cleveland, Ohio. All invoices and statements relating to such sales were and are mailed from the Cleveland Office of Carling Brewing Company directly to the California purchasers.

5. At all times referred to in the Complaint and since, California purchasers of the merchandise of Carling Brewing Company were and are wholesale distributors of the Company's products in California, which said wholesale distributors being duly licensed by the State of California for such business purchased said merchandise for resale and to the best of affiant's knowledge and belief did resell same to other duly licensed wholesale or retail purchasers in California not customers of said Carling Brewing Company. In all instances the said California purchasers from Carling Brewing Company were responsible for and paid all transportation charges from Cleveland, Ohio, to destination of shipment.

6. Neither of the plaintiffs was ever an officer or employee of Carling Brewing Company. Neither

plaintiff ever received a salary and expense account or other personal compensation from Carling Brewing Company. Neither [58] plaintiff ever served Carling Brewing Company in the State of California, or elsewhere, as agent, distributor or in any other capacity whatsoever.

7. Mr. K. W. Burrie is the west coast regional representative of Carling Brewing Company and has desk space in the office of Mr. Ben Fields, Secretary of the Southern California Beverage Wholesalers Association at 6399 Wilshire Boulevard, Suite 405-406, Los Angeles, at which address he also has telephone service and Carling Brewing Company is listed in the telephone book, the phone number being that for the offices at 6399 Wilshire Boulevard. Also Mr. K. W. Burrie has working under his direction in California and on the west coast six field representatives of Carling Brewing Company, four of whom spend substantial amounts of their time in the interests of Carling Brewing Company within the State of California. Said K. W. Burrie and his assistants perform the following duties on behalf of their employer—

(a) They call upon said wholesale distributors of beer and ale of the Carling Brewing Company. Said distributors are requested to maintain their sales and distribution records in accordance with a pattern recommended by Carling and said representatives examine said records from time to time ascertaining and reporting to Cleveland, Ohio, the sales volume and distribution of said Carling products;

(b) They make recommendations to said distribu-

tors encouraging the distributors in their sales efforts of said Carling products in California, also encouraging the use of Carling point of sale material supplied said distributors and making recommendations for the most effective use of the same in the interests of said products;

(c) They seek in their everyday contacts with said distributors, retail customers of said distributors and all others with whom they may come in contact to popularize and promote public acceptance of the beer and ale of Carling Brewing Company; [59]

(d) They accompany sales representatives of said distributors on visits to customers of said distributors encouraging purchases by said customers of said Carling products from said distributors and assisting said distributors in their sales efforts of said Carling products, but any sales resulting from the cooperative effort of said Carling representatives and said distributors' representatives are on account of orders which may be placed by the customers of said distributors with said distributors and not with Carling Brewing Company;

(e) They are "good-will" or "promotional" representatives of Carling Brewing Company and all of their activities, including the foregoing, are of a general character. They conclude no sales in California.

8. None of the aforementioned activities of Carling Brewing Company, or of any of its employees or representatives in the State of California, have any relationship whatsoever to nor have the same in any way given rise to the liabilities sued upon

by the plaintiffs and as stated by the plaintiffs in their Complaint, and this affiant further says that there has been nothing done by Carling Brewing Company in the State of California having any relationship whatsoever to nor have the same in any way given rise to the liabilities sued upon by the plaintiffs.

9. All acts for and on behalf of Carling Brewing Company in the State of California are limited in extent to those acts stated hereinabove.

Affiant further says that at all times mentioned in the Complaint and at the present time the following are acts for and on behalf of said corporation by its officers, employees and agents which were not done in the State of California:

(a) Carling Brewing Company did not and does not maintain [60] an inventory or stock of goods in the State of California; said company did not and does not fill orders from a stock of its beer and ale in the State of California;

(b) Said company did not and does not have any salesmen or other employees accepting in said State orders for said company;

(c) Said company did not and does not fix prices for its merchandise in California; nor approve sales in California of said orders being accepted in the City of Cleveland, Ohio, as aforestated. Prices for said company's merchandise were established only in Cleveland;

(d) Said company did not and does not ship its merchandise to any purchaser in California on a contingent basis;

(e) Said company never sold or shipped any merchandise whatsoever to the plaintiffs;

(f) Said company did not and does not ship its products to California, or elsewhere, by any transportation means owned or leased by it;

(g) Said company did not and does not make local deliveries within California of its products in any manner whatsoever;

(h) Said company does not maintain a bank account in the State of California;

(i) Said company does not make collections or receive any payments for its merchandise within the State of California, all such collections and payments being required to be made and being made in Cleveland, Ohio;

(j) Said company does not make any purchases within the State of California of ingredients, goods or supplies relative to its said products; [61]

(k) Said company did not and does not lend any money or have any interest in any of the independent wholesale distributors handling the merchandise of Carling Brewing Company within the State of California;

(l) Said company did not lend any money to the plaintiffs or have any business relation with said plaintiffs whatsoever either in the State of California or elsewhere;

(m) Said company did not and does not have any officer resident in California or other employee or agent in said State authorized to accept service of process upon it, K. W. Burrie and the others working with him with the limited powers and authority

as aforestated being the only employees resident in said State.

10. Affiant makes the foregoing statements with the understanding that the same may be used in support of a motion on special appearance of said defendant Carling Brewing Company in the case appearing on the docket of the United States Court, Southern District of California, Central District, under No. 18034 P. H. and entitled "William LeVecke and Reed LeVecke, d.b.a. The LeVecke Company, Plaintiffs vs. Griesedieck Western Brewery Co., et al., Defendants."

11. Further affiant saith not.

/s/ IAN R. DOWIE

Subscribed and sworn to before me, a Notary Public in and for the State of Ohio, this 9th day of April, 1955.

[Seal] /s/ JOHN LADD DEAN,
Notary Public [62]

1
2
3

DISTRIBUTOR'S ORIGINAL ORDER

SUBJECT TO ACCEPTANCE AT CLEVELAND OHIO

DATE ORDER REC'D (LEAVE BLANK)	DISTR ORD NO	SHIPPING DATE REQUESTED	STATE PERMIT NO	FEDERAL NO	TOTAL WEIGHT ORDER NO (LEAVE BLANK)

VIA OWN TRUCK ☐ VIA COMMON CARRIER NAME _____ ROUTE _____ CARRIER WILL HAVE EMPTIES ☐ YES ☐ NO

DISTRIBUTOR'S NAME AND ADDRESS

SOLD TO

ADDRESS FOR SHIPMENT WHEN NOT THE SAME

SHIPPED TO

	CARTONS ORDERED	RED CAP ALE	WEIGHT	CARTONS ORDERED	BLACK LABEL BEER	WEIGHT
DEPOSITS		24/12 3.2 H. P.			24/12 3.2 H. P.	
		12/32 3.2 H. P.			12/32 3.2 H. P.	
		/7 3.2 H. P.				
ONE WAYS		24/12 3.2 H. P.			24/12 3.2 H. P.	
		24/12 Six Pack 3.2 H. P.			24/12 Six Pack 3.2 H. P.	
		24/12 Ty-Pack 3.2 H. P.				
		12/32 3.2 H. P.			12/32 3.2 H. P.	
CANS		24/12 3.2 H. P.			24/12 3.2 H. P.	
		48/12 Six Pack 3.2 H. P.			48/12 3.2 H. P.	

SPECIAL INSTRUCTIONS

NAME OF DISTRIBUTOR

SIGNED BY

TITLE

EXHIBIT "A"

63

27
28
29
30

Sheppard, Mullin, Richter & Hampton

EXHIBIT "A"

EXHIBIT No. 2

AFFIDAVIT OF H. R. TREES

State of Ohio,
Cuyahoga County—ss.

H. R. Trees, being first duly sworn on his oath says:

1. I reside at Mill Hollow Drive, Moreland Hills Village, Ohio. I am Treasurer of the Carling Brewing Company and I have been Treasurer of said corporation from 1951 to date and at all times referred to in the Complaint. I have personal knowledge of the facts stated herein.

2. I have read the affidavit of Ian R. Dowie dated April 9, 1955, and I confirm and agree with the contents thereof. To supplement the aforesaid affidavit I, as chief accounting officer of Carling Brewing Company, supply the following additional information based on my personal knowledge.

3. The only exceptions to the procedures described in the aforesaid affidavit during the four years next preceding the date of this affidavit have been a very few isolated instances when one California purchaser has transferred to another California purchaser, for reasons of the convenience of one or both of such purchasers, limited quantities of Carling Brewing Company's beer and ale. In some such instances, for reasons of the convenience of one or both of such purchasers, a credit or refund has been made by Carling Brewing Company from

Cleveland, Ohio, to the transferor and a charge has been made by Carling Brewing Company at Cleveland, Ohio, to the transferee. Title to such transferred beer and ale passes directly from the transferor to the transferee and the bookkeeping entries made in Cleveland, Ohio, by Carling Brewing Company treat the transaction as an adjustment between two accounts receivable.

4. Affiant makes the foregoing statements with the understanding that the same may be used in support of a motion on special appearance of said defendant Carling Brewing Company in the case appearing on the docket [64] of the United States Court, Southern District of California, Central District, under No. 18034 P. H. and entitled "William LeVecke and Reed LeVecke, d.b.a. The LeVecke Company, Plaintiffs vs. Griesedieck Western Brewery Co., et al., Defendants."

5. Further affiant saith not.

/s/ H. R. TREES

Subscribed and sworn to before me, a Notary Public in and for the State of Ohio, this 10th day of April, 1955.

[Seal] /s/ JOHN LADD DEAN,
Notary Public [65]

Acknowledgment of Service attached. [66]

[Endorsed]: Filed April 11, 1955.

[Title of District Court and Cause.]

AFFIDAVIT OF WILLIAM R. LeVECKE IN OPPOSITION OF MOTION TO QUASH SERVICE OF SUMMONS AND COMPLAINT

State of California,
County of Los Angeles—ss.

William R. LeVecke, being first duly sworn, deposes and says:

That he is one of the plaintiffs in the above entitled action and is a resident of the State of California. That he has read the affidavit of Reed LeVecke, one of the plaintiffs in said action, and all of the facts contained therein are within this affiant's knowledge and are true and are incorporated herein by reference.

That defendant Griesedieck Western Brewery Company did business in the State of California at all times between the year 1950 and November 30, 1954. That the officers of said defendant were in California during said period of time and personally [74] supervised the sales of the said defendant's products.

Typical of the sales efforts of said defendant in this State, there is related hereinbelow the business efforts of defendant's President, Edward Jones, on three of his visits to California:

1. October 1951. Edward Jones came to California in order to increase the sales of defendant's beer products in this State. At this time affiant accompanied said Edward Jones from place to place in California wherein, in part, the following transpired:

The first two days in Los Angeles with Mr. Jones were spent in calling on some 40 to 50 supermarkets in the area. These consisted of Alexander Stores, Shopping Bags, Thriftymart, and Safeway Stores. In each case Mr. Jones thanked the managers for the fine promotions and the sales of Hyde Park Beer, and he gave them suggestions for increasing the sales of the beer. In some instances he helped stack shelves and bring cases of Hyde Park from the rear of the stores.

The following day he called on Certified Grocers where he and affiant met with Mr. Campbell Stewart, President of the company, and had lunch with Mr. Murray Yunker, Vice President and General Manager. Mr. Yunker took them through their warehouse and explained the operation to Mr. Jones. Their picture was taken in front of the Hyde Park stock in the warehouse, and this picture with an article relative to Mr. Jones' visit appeared in Certified's CoOperator (Exhibit "E").

Mr. Jones and affiant then went to San Francisco where they called on Mr. Jack Egan of the First California Company, who was an acquaintance of Mr. Jones, in an effort, as suggested by Mr. Jones, to obtain the Lucky Store business. Mr. Egan took

Mr. Jones and affiant to meet Mr. Dardi of the Blair Holding Company who was also Chairman of the Lucky Stores, Inc. During this meeting Mr. [75] Jones attempted to sell his company's beer to said Lucky Stores. After this meeting, Mr. Jones expressed himself as very confident that he could secure the Lucky Stores business. Later that day he called on Mr. Ed Million of Drexel Distributing Co. (subsidiary of Safeway) in charge of all purchases of beer and wine for the Safeway chain. Mr. Jones thanked him for the business and told him he was interested in aiding Drexel to step up sales of defendant's beer in California. He also assured Million that the beers of said defendant Griesedieck Western Brewery Company were here to stay on the Pacific Coast. Mr. Jones returned to St. Louis from San Francisco. Upon his return to the brewery, affiant was told that he held a meeting with all of his department heads relative to the merchandising methods that were being employed in California. Mr. Jones then set up a merchandising department at the brewery and patterned its operation after that in California.

2. October 1952. Edward Jones came to California on a sales trip prearranged with affiant. Affiant accompanied Edward Jones on said sales trip for said defendant from place to place in California, and, in part, the following transpired:

Edward Jones arrived the first part of October and upon his arrival he called upon approximately 50 supermarkets where Stag and Hyde Park Beers

were displayed for sale. Mr. Jones thanked the managers for their continued support of his company's products, the said defendant herein, and showed them ways to increase their sales of Hyde Park and Stag Beer.

He then called upon the buyers for Certified Grocers, Shopping Bag, Von's, Thriftymart and others. He assured these buyers that the brewery was financially sound and showed them the brewery's financial report, and assured them that the beers were here to stay on the west coast and that this was not a "fly by night" operation.

The next day he called upon the officials of Certified [76] Grocers and emphasized the fact that the beer products of said defendant were here on the west coast to stay and that he was looking forward to increased sales of defendant's beer products through their organization.

He then went to San Francisco where he called upon the United Grocers, who had just recently started selling the beer products of said defendant. United Grocers is a large co-operative grocery organization similar to Certified. He talked with Mr. Sorenson, the President, and Mr. Henry Reidt, the General Manager of United Grocers. Mr. Sorenson wanted to be assured that this was not a temporary setup and stated that his company had an unhappy experience with a beer that had been supplied to them for a short time and then was taken away by the supplier. Mr. Jones assured them that this would not happen to Hyde Park and Stag, as said

defendant company was here on the west coast to stay. He then gave him a copy of the financial report of said defendant. Mr. Sorenson was very much impressed. From then on, United's branch outlets got behind the beer products of said defendant and sales increased considerably.

While in San Francisco Mr. Jones called on Ed Million of Drexel Distributing Company and thanked him for past business and gave suggestions for increasing sales of said defendant's beer products. Later that day he called upon his friend Mr. Egan and Mr. Dardi in an effort to obtain the Lucky Stores business.

3. October 1953. Edward Jones cames to California on a sales trip for said defendant which trip was prearranged with affiant. Affiant accompanied Edward Jones on said sales trip from place to place in California and, in part, the following took place:

Affiant met Mr. Jones in Tucson, Arizona, where Mr. Jones called on outlets handling Stag and Hyde Park beers. From there they drove to Phoenix where Mr. Jones called on Mr. Roland, division manager of the Safeway Company. Mr. Jones congratulated him on the [77] splendid job the Safeway was doing with Stag beer in that district. He then called on A. J. Bayless, President of 24 Bayless Markets in the Phoenix area. Mr. Jones gave Bayless a financial statement of said defendant Griesedieck Western Brewery Company and as-

sured him of the soundness of the brewery and that the beers of said defendant were out here to stay.

Mr. Jones called upon the retail stores in that area. He presented each manager with a mechanical pencil and the buyers for the organization with a Sterling silver bottle opener.

The next day Mr. Jones called on supermarkets in the Los Angeles area, and he presented each manager with a mechanical pencil and discussed with them the sales of said defendant's beer products.

The following day Mr. Jones called upon the buyers for the large chain stores that handled said defendant's beer in the Los Angeles area. Each buyer was given a Sterling silver opener by Mr. Jones and he discussed with them the sale of said defendant's beer products. He also called upon Certified's officials and they too were presented with openers by Mr. Jones. He told them that he was very grateful for the business they had given the said defendant brewery and discussed with them means of increasing the sales of said defendant's beer products.

Mr. Jones next went to San Francisco and called upon United Grocers and Safeway, thanking them for past business and telling them that said defendant was looking forward to more business. Each official of said company was presented with a silver bottle opener. He then called upon the Lucky Stores office and discussed with the officials of said stores defendant's beer products.

On this sales trip, Mr. Jones took pride in telling all accounts that the west coast had a 100% increase in Hyde Park and Stag sales in 1953 over that of 1952, and stated that he was looking forward to an additional 25% increase in 1954. [78]

Mr. Jones and Henry Sewing (merchandising manager of said defendant) returned to California in November of 1953 and attended a party given by the Shopping Bag Stores at the end of a contest on the sale of Hyde Park and Stag in said stores. Mr. Jones donated, on behalf of defendant Griesedieck Western Brewery Company, $100.00 toward prizes for the event. He stated he was very impressed with the party and the enthusiasm of the employees for the two beer products of said defendant. He gave a talk to the employees and thanked them for their past support in the sale of defendant's beer products and said he was looking forward to attending their party every year. Mr. Jones returned to St. Louis and Henry Sewing remained for two days during which time he inspected the merchandising setup of plaintiffs for the sale of said defendant's beer products.

That defendant Griesedieck Western Brewery Company kept a steady flow of its beer products coming into the State of California between 1950 and November 30, 1954. That the business of said defendant was increased every year until during the year 1954 it became fifth in size of business done in the State of California among all breweries which imported beer into this State. The business

of defendant in this State was due to its direct and constant solicitation of business through its officers and through plaintiffs as defendant's agents and representatives. That the business done by said defendant in the State of California was a substantial part of its business, and because of the business done in California by the said defendant, the latter regarded California as one of its chief markets.

That the said defendant Griesedieck Western Brewery Company at all times directed plaintiffs how to advertise and sell defendant's beer products and controlled the prices at which its beer products were sold in the State of California. [79]

That plaintiffs, in addition to selling the beer products of said defendant, acted for, and were given the authority by said defendant to settle disputes between said defendant and the customers who purchased said defendant's beer products and to distribute and push the placement of defendant's advertising signs in the State of California. Copies of letters relative to such a dispute and advertising matter are set forth as Exhibit "L".

/s/ WILLIAM R. LeVECKE

Subscribed and sworn to before me this 13th day of April, 1955.

[Seal] /s/ BELLE KENNICOTT,

Notary Public in and for the County of Los Angeles, State of California. [80]

Acknowledgment of Service attached. [81]

[Endorsed]: Filed April 14, 1955.

[Title of District Court and Cause.]

AFFIDAVIT OF REED LeVECKE IN OPPOSITION TO MOTION TO QUASH SERVICE OF SUMMONS AND COMPLAINT

State of California,
County of Los Angeles—ss.

Reed LeVecke, being first duly sworn, deposes and says:

That he is one of the plaintiffs in the above entitled action and is a resident of the State of California. Reference is made herein to certain exhibits which are filed herewith under a separate cover.

That during the years 1950 to November 30, 1954, inclusive, affiant was the agent and representative of the defendant Griesedieck Western Brewery Company in the State of California and maintained an office in the City of Los Angeles at 1807 East Olympic Boulevard. That said business location was the address of said Griesedieck Western Brewery Company in the State of California. That during said years plaintiffs sold in California and Arizona [82] the beer made by said defendant. That the beer of said defendant was sold under the brand names of Hyde Park Beer and Stag Beer. That from time to time during these years an officer of said defendant would visit California and assist plaintiffs in making sales of the beer products of said defendants. Copies of letters from an officer of said de-

fendant Griesedieck Western Brewery Company which contain references to the sales efforts that the said defendant was making in California are set forth as Exhibit "A".

That when plaintiffs obtained orders for the sale of said defendant's beer products in the State of California, the said defendant would confirm with said vendees the sales arrangement. Many of these sales and arrangements for the same were made personally by the President of said defendant company. In some instances when requested to do so, the President of said defendant company gave said vendees its financial statement to show that it was able to meet its obligations and carry out said sales arrangements. Copies of letters to some of said purchasers are set forth as Exhibit "B" and state therein that the said defendant company is on the Pacific Coast to stay and are adding to its organization in California.

That said defendant at all times closely supervised the work of plaintiffs in California and directed plaintiffs how to carry out their sales efforts and as above stated sent its officers to California to assist plaintiffs in their sales efforts as shown by Exhibits "A" and "B".

That said defendant notified the California purchasers of its beer products that the sale of said beer was business between said purchaser and said defendant. A typical confirmation of said relationship is shown by copies of letters set forth as Exhibit "C".

That Edward Jones, the President of said de-

fendant, assisted in the sale of the beer products of said defendant in the State of California, and while in California's posed in a picture with [83] the plaintiffs whom he introduced as the said defendant corporation's representatives. A copy of said picture is set forth as Exhibit "D".

That as agents for said defendant, plaintiffs handled much of the said defendant's other business matters in California in addition to the sale of beer, and plaintiffs answered correspondence addressed to said defendant as defendant's agent. A copy of letters showing some of these activities are set forth as Exhibit "E".

That said defendant Griesedieck Western Brewery Company advertised its products throughout the State of California. A copy of letters showing some of this advertising is set forth as Exhibit "F".

That said defendant Griesedieck Western Brewery Company delivered to plaintiffs sales delivery books and required plaintiffs to make delivery of defendant's beer products on said delivery slips contained in said books which showed that the beer delivered by plaintiffs was received by the customer in California from said defendant Griesedieck Western Brewery Company through plaintiffs as defendant's agents. Copies of said books are set forth as Exhibit "G".

That on all large sales of beer in California, the orders for said sales were confirmed on an "Order Confirmation," the form of which was approved by said defendant and was signed by plaintiffs as agents and employees of said defendant. A copy of

said "Order Confirmation" is set forth as Exhibit "H".

Letterheads and envelopes of defendant Griesedieck Western Brewery Company with said company's name and principal office address were sent to plaintiffs in California for use by plaintiffs as agents of said defendant. Plaintiffs used said stationery and signed the same as agents and employees of said defendant, and plaintiffs, with the consent of said defendant, held themselves out to the various purchasers of beer in the State of California as agents and employees of said defendant. Some of [84] said letterheads are set forth as Exhibit "I".

Business cards of said defendant Griesedieck Western Brewery Company were sent to plaintiffs in California for use of the latter in California. Said cards show the names of plaintiffs as agents of Griesedieck Western Brewery Company. A copy of a letter sending these cards to plaintiffs and the cards are attached hereto as Exhibit "J".

The said defendant Griesedieck Western Brewery Company is, and has been since 1952, listed in the Central Section of the telephone directory and the Classified Directory of the Pacific Telephone and Telegraph Company in the County of Los Angeles, State of California, at the same address and telephone number as is set forth in Exhibit "J".

That said defendant paid to plaintiffs a commission on all sales in California of said defendant's products to Drexel Distributing Company. That said Drexel Distributing Company is a subsidiary

of Safeway Company and has its principal office in San Francisco, California. That the commission paid to plaintiffs by said defendant on said sales to Drexel Distributing Company in California were about $15,000.00 per year and said commissions were in payment for the services rendered by plaintiffs in obtaining said account for said defendant. Drexel always considered and looked to plaintiffs as agents of said defendant as shown in Exhibit "K".

/s/ REED LeVECKE

Subscribed and sworn to before me this 13th day of April, 1955.

[Seal] /s/ BELLE KENNICOTT,
Notary Public in and for the County of Los Angeles, State of California. [85]

Acknowledgment of Service attached. [86]

[Endorsed]: Filed April 14, 1955.

[Title of District Court and Cause.]

EXHIBITS

(In Opposition to Motion to Quash Service of Summons and Complaint)

EXHIBIT "A"

[Letterhead of Edward D. Jones and Co.]

Mr. Wm. LeVecke September 18, 1953
LeVecke Distributing Co.,
1807 Olympic Blvd., Los Angeles, Cal.

Dear Bill:

I had planned to bring Sewing with me to California but I believe I would like to defer his coming along at this time because of some other activities that we want him to take care of.

Will this make any difference to you?

If it will be just as convenient for you and me to work the territory together, let me know by return mail.

Very truly yours,

EDJ:eb /s/ Ed [88]

[Letterhead of Griesedieck Western Brewing Company]

Mr. William R. LeVecke
The LeVecke Distributing Co.
1807 East Olympic Boulevard
Los Angeles 21, California

October 1, 1952

Dear Bill:

I am leaving St. Louis Saturday, October 4th on the Golden Gate, train No. 3, and will arrive in Los Angeles on Monday, October 6th, at 7:35 a.m., and I assume you have a room reserved for me at the Statler Hotel in Los Angeles so that I can get into it immediately.

After taking a shower I will be ready to hit the road with you for the next two or three days and then I would like to go to San Francisco and spend a couple of days with you and your endeavors.

Do not arrange anything for me to do at night be-

Exhibit "A"—(Continued)

cause either you or I will be very tired calling on super markets during the day.

Looking forward with much pleasure to seeing you next week I remain with warmest regards,

Yours sincerely,

/s/ Edward D. Jones, President

EDJ:ES—Via Air Mail [89]

[Letterhead of Griesedieck Western Brewing Company]

October 16, 1951

To Our California Stockholders:

I have just returned from a two weeks' trip to California. I was very much impressed with business conditions there, and particularly the weather as it relates to our products—Hyde Park "75" and Stag Beer.

While there, I called on about thirty supermarkets with our distributor, Mr. William LeVecke, LeVecke Distributing Co., 1807 E. Olympic Blvd., Los Angeles, California, Tel: Vandyke 7944. In all of these markets, I was happy to find Hyde Park "75" prominently displayed and enjoying a good consumer acceptance—thanks to our loyal stockholders in that area who undoubtedly have helped materially in creating this acceptance.

We are now introducing Stag Beer in your area, and I sincerely hope for and will appreciate your continued cooperation. May I suggest that you try Stag Beer and recommend it to your friends, al-

Exhibit "A"—(Continued)

though I hope it won't be at the expense of Hyde Park "75" which is fast becoming a favorite in California. Both brands are distinct types of beer, and they appeal to most every beer connoisseur. Enclosed find a printed folder explaining the distinct qualities and dryness of Stag Beer. It is worth your reading.

In the event Hyde Park "75" or Stag are not available in your area, won't you be good enough to telephone or write to our distributor, Mr. LeVecke, and give him the name and address of the supermarket where you shop. He will promptly follow through and get that market to handle our beers. You can be of material help to your Company by reporting such cases to Mr. LeVecke promptly.

Yours for the continued growth and progress of your Company which is among the leading breweries in the industry.

Sincerely,

Griesedieck Western Brewing Company
/s/ Edward D. Jones, President

EDJ:ak [90]

Mr. E. W. Plumb October 20, 1953
Shopping Bag Food Stores
2716 San Fernando Road, Los Angeles, California

Dear Mr. Plumb:

I sincerely appreciate the time you gave our Representative, Mr. William LeVecke, and myself on my recent visit to Los Angeles. It does us a lot of

Exhibit "A"—(Continued)

good to exchange ideas with outstanding merchants like yourself.

Mr. LeVecke and I called on approximately twenty of your stores and made a survey that was most comprehensive. I am sure Mr. LeVecke would be happy to give you excerpts of the survey at any time you would like to know about it.

Let me compliment your firm's policy and the store manager's fine housekeeping throughout the entire area.

I again want to thank you and your organization for the fine business you have been entrusting to us and you may be sure we appreciate this confidence.

Without being egotistical, we are happy to report that our business in your area so far this year is twice what it was in a similar period last year.

I am looking forward to being with you November 11th and I plan to bring our Merchandising Vice-President, Mr. Henry G. Sewing, with me, however, Mrs. Jones will be unable to make the trip.

Very truly yours,

Edward D. Jones

EDJ:lo Chairman of the Board [91]

Mr. R. E. Lundeen October 19, 1951
Fitzsimmons Stores Inc.
2600 South Vermont Ave., Los Angeles, Calif.

Dear Mr. Lundeen:

I want to thank you for the courtesy and the time you took to show us the "behind the scenes" equip-

Exhibit "A"—(Continued)

ment and the other details that you pointed out to us in your new Van Nuys store. I was amazed at the completeness and the details that you have worked out in connection with these new stores.

It was a great pleasure for me to visit your stores with our Mr. LeVecke.

I was particularly impressed with one of your managers, and if my memory serves me correctly, his name is Hank Moffett, in one of your Long Beach stores. He was the most enthusiastic liquor department managers that I met in California. He really should be working for a brewery, because he is a great salesman.

I am sorry that I could not stay over a few days and see the opening at your Van Nuys' store, because as you explained and others have told me, these openings are better than a Ringling Bros. Circus.

At any time when you are in the St. Louis area, I hope you will call on us and inspect our brewery, and if there is anything I can do in this area for your firm, please command me.

Very truly yours,

Griesedieck Western Brewery Company

Edward D. Jones, President

EDJ:ak [92]

Exhibit "A"—(Continued)

Via Air Mail May 22, 1952

Mr. John L. Hamilton
Pacific Mercantile Co.
461 Market St., San Francisco 5, Calif.

Dear Mr. Hamilton:

Our representative, Mr. William LeVecke, reports getting our beers established in your good firm. We are most appreciative of this, and you may be sure that we at the Brewery will follow this account and do everything we can at this end to give you good service and satisfaction.

It might interest you to know that our Company is 101 years old, and ranks twelfth in the industry, as shown on the attached reprint from Modern Brewery Age.

We do a tremendous distribution job through grocery outlets. As you well know, beer carries extraordinary profits. It is easy to merchandise, and you will find it an excellent piece of merchandise for your great distribution system.

Any time you are in the vicinity of St. Louis, please made arrangements to spend at least a day with us and inspect our facilities.

Sincerely yours,

Griesedieck Western Brewery Company
Edward D. Jones, President

EDJ:ak—Enc. [93]

Exhibit "A"—(Continued)

Via Air Mail (Copy)

Mr. Lawrence R. Graefe May 3, 1954
Bob's Market
645 E. Carson, Torrance, California

Dear Mr. Graefe:

We recently learned through the Co-Operator that you are one of the new members of the Certified Grocers Association.

We are one of the suppliers for the Certified Chain, and we enjoy exceptionally fine business from the Certified Group. Our products are Stag Beer and Hyde Park "75" Beer.

Our representative is Mr. William LeVecke, 1807 East Olympic Blvd., Los Angeles, California, phone: Vandyke 7944. If you are not handling our products, a telephone call to Mr. LeVecke will be an easy way to get acquainted with our profitable line for distribution in your neighborhood.

At any time that you are in St. Louis, I would be happy to have you call on us and inspect our facilities.

Very truly yours,

Griesedieck Western Brewery Company
Edward D. Jones

EDJ:bs Chairman of the Board [94]

5/3/54

The attached letter was sent to the following: Lawrence R. Graefe, 645 E. Carson, Torrance, Calif. (Bob's Market); N. & M. Adelson & M. Kaufmann,

Exhibit "A"—(Continued)

15017 S. Crenshaw Blvd., Gardena, Calif. (Marketown); Wayne D. & Glayds A. Graham, 1516 Bayview, Wilmington, Calif. (Graham's Market); George H. & Alvina Stahr, 2120 Harbor Rd., Costa Mesa, Calif. (Stahr's Mkt.); Joseph R. & Mary L. Darnell, P.O. Box 205, Ilyllwidld, Calif. (Idyllwide Mkt.) [95]

Mr. H. L. Sorensen October 19, 1953
United Grocers, Ltd.
685 Sixth Street, San Francisco, California

Dear Mr. Sorensen:

I was happy to shake your hand on my recent visit to San Francisco with our Representative, Mr. William LeVecke.

I thought you looked fine and appeared more alert than ever, so I was dumfounded when you said you were on the way to the Doctor's office, but I presumed it was just a periodic check-up which, of course, is always good for all of us.

Let me compliment your firm's policy and the store manager's fine housekeeping throughout the entire area.

I again want to thank you and your organization for the fine business you have been entrusting to us and you may be sure we appreciate this confidence.

Without being egotistical, we are happy to report that our business in your area so far this year is twice what it was in a similar period last year.

Anytime you are in the St. Louis area, I hope

Exhibit "A"—(Continued)

you will let us show you our fine facilities, and it will be a pleasure to entertain you when you are in the city.

Very truly yours,

Edward D. Jones

EDJ:lo Chairman of the Board [96]

October 19, 1953

Mr. F. E. Rowland, District Manager
Safeway Stores, Inc.
210 E. Fourth Street, P.O. Box 680,
Phoenix, Arizona

Dear Mr. Rowland:

I sincerely appreciate the time you gave our Representative, Mr. William LeVecke, and myself on our recent visit to Phoenix. It does us a lot of good to exchange ideas with outstanding merchants like yourself.

Mr. LeVecke and I called on sixty-eight Safeway Stores and made a survey that was most comprehensive, starting in Tucson and ending in San Francisco. I am sure Mr. LeVecke would be happy to give you excerpts of this survey at any time you would like to know about it.

Let me compliment your firm's policy and the store manager's fine housekeeping throughout the entire area.

I again want to thank you and your organization for the fine business you have been entrusting to us and you may be sure we appreciate this confidence.

Exhibit "A"—(Continued)

Without being egotistical, we are happy to report that our business in your area so far this year is twice what it was in a similar period last year.

Anytime you are in the St. Louis area, I hope you will let us show you our fine facilities, and it will be a pleasure to entertain you when you are in the city.

Very truly yours,

Edward D. Jones

EDJ:lo Chairman of the Board [97]

EXHIBIT "B"

Mr. Henry Reidt Oct. 21, 1952
Manager United Grocers
685 Sixth Street, San Francisco, Calif.

Dear Mr. Reidt:

It was a pleasure to meet you and Mr. Sorensen a few days ago, and we are most happy with our association with your good firm.

I should like to emphasize that we are on the Pacific Coast to stay, and as revealed in our financial statement that I gave to your Mr. Sorensen, you will believe me when I say that we are financially responsible to carry out our obligations to you and your dealers.

If you have any ideas as to how we may make our association more profitable, and if you can suggest

Exhibit "B"—(Continued)

how it will function more smoothly, please command me.

With warmest regards,

Very truly yours,

Griesedieck Western Brewery Company
Edward D. Jones, President

EDJ:ak [98]

Mr. Henry J. Carty Oct. 21, 1952
c/o Certified Grocers
401 North LaBrea Ave., Los Angeles, Calif.

Dear Mr. Carty:

It was a pleasure to meet you in Mr. Campbell Stewart's office the other day. I regret that I did not have more time to tell you about our Company and our products. However, our Mr. LeVecke and the Certified group no doubt have acquainted you with our organization.

I would like to reiterate that we are on the Pacific Coast to stay, and if you will inspect our financial statement, you will find that we are financially responsible and that we can carry out our responsibility to your good organization.

If there is anything I can do at this end of the line for you, please command me.

Very truly yours,

Griesedieck Western Brewery Company
Edward D. Jones, President

EDJ:ak [99]

Exhibit "B"—(Continued)

Mr. A. D. Murrell Oct. 21, 1952
1489 W. Washington Blvd., Los Angeles, Calif.

Dear Mr. Murrell:

On my annual visit to California I was unable to see you, but I met you a year ago and was very much impressed with you and your stores. Mr. LeVecke, our representative, and I visited several of your stores. I was particularly impressed with the box car display. We find that point-of-purchase displays of this kind build traffic in stores and sell more of our products.

We are on the West Coast to stay. We are adding to our organization in the California area, and I am sending you one of our financial statements which will prove to you that we are financially responsible and prepared to carry out programs that we undertake.

Any time you are in the St. Louis area, I hope you will arrange to come in and spend the day and let me show you our facilities and something of St. Louis.

If there is anything I can do to facilitate matters for you at this end of the line, please command me.

Very truly yours,

Griesedieck Western Brewery Company
Edward D. Jones, President

EDJ:ak [100]

Exhibit "B"—(Continued)

Mr. Charles Von Der Ahe Oct. 21, 1952
President, Von's Supermarket
P.O. Box 324, Culver City, Calif.

Dear Mr. Von Der Ahe:

Our representative, Mr. William LeVeck, and I tried to call you last week to make an appointment, but someone in your organization reported you were not available. Mr. LeVeck and I, however, visited several of the Von Stores, and I would like to compliment all of your managers on good housekeeping. Your stores seem to be the most outstanding supermarkets in the Los Angeles area.

We have been on the Pacific Coast with our products, Stag and Hyde Park "75", for over a year. Our business is increasing every day. It might interest you to know that we ship a carload a day into the California area, and I would also like to emphasize that Stag and Hyde Park "75" are premium products.

I am sending you one of our financial statements so you will know our financial integrity and our ability to carry out and support our Mr. LeVeck's merchandising program.

Any time you are in the St. Louis area, I hope you will arrange to come in and spend the day and let me show you our facilities and something of St. Louis.

If there is anything I can do to facilitate matters

Exhibit "B"—(Continued)

for you at this end of the line, please command me.

Very truly yours,

Griesedieck Western Brewery Company
Edward D. Jones, President

EDJ:ak [101]

EXHIBIT "C"

Griesedieck Western Brewery Company
Belleville, Illinois

Duca and Hanley Super Market Sept. 4, 1952
Santa Cruz Boulevard
Menlo Park, California

Gentlemen:

One of our St. Louis stockholders and a resident here, has spent the summer in your town and advised me that they were very much impressed with your fine store and they were happy to be able to purchase Hyde Park "75" at your store. They also stated that many of their friends are patronizing your store and purchasing Hyde Park "75".

We are doing a mighty fine business in California and one super market operator in the Los Angeles area just wrote me of a very simple promotion that he engaged in that might be of interest to you, namely, he built a 100 mass case display and merely put on the top of the display, "Old Time Beer Made in St. Louis . . . Try It" and the price tag, of course, and he reports that 100 cases sold out on Saturday and Sunday morning.

Our representative, Mr. William LeVecke, 1807 East Olympic Boulevard, Los Angeles, will be

Exhibit "C"—(Continued)

happy to handle any special inquiry that you may have regarding our company or products.

Let me again thank you for your co-operation in stocking and selling our Hyde Park "75".

At any time any members of your organization are in this vicinity, we would be happy to have them inspect our breweries.

Yours very truly,

Griesedieck Western Brewery Company
Edward D. Jones, President

EDJ:ES—Via Air Mail—cc. Mr. Wm. LeVecke, LeVecke Distributing Co., Los Angeles, California. [102]

Mr. Murray Yunker October 20, 1953
Certified Grocers of California, Ltd.
2601 South Eastern Avenue
Los Angeles, California

Dear Mr. Yunker:

I sincerely appreciate the time you gave our Representative, Mr. William LeVecke, and myself on my recent visit to Los Angeles. It does us a lot of good to exchange ideas with outstanding merchants like yourself.

I again want to thank you and your organization for the fine business you have been entrusting to us and you may be sure we appreciate this confidence.

Without being egotistical, we are happy to report that our business in your area so far this year is twice what it was in a similar period last year.

Exhibit "C"—(Continued)

Mr. LeVecke and I have made a comprehensive survey of the Los Angeles area on beer sales and beer distribution and, I am sure, Mr. LeVecke would be happy to give you excerpts from it which you will find most interesting.

As I view it, your operation, as it relates to beer sales and beer distribution, is ideal. I think in another six or twelve months it will be one of your most profitable divisions, because of certain high costs, warehouse and delivery expenses that are winding themselves around the beer industry. You have the answers with your operation and with a little more patience, I am sure it will be very gratifying to you and your members.

Mr. LeVecke and his organization has developed the best merchandising plan in the beer industry, and your members can profit by it if they will give us cooperation, plus the "green light" in building displays and other mass sales appeals.

Our survey reveals, not only in your area but in other metropolitan areas in the United States, that sales of beer in grocery outlets are mounting every day. [103]

Anytime you are in the St. Louis area, I hope you will let us show you our fine facilities, and it will be a pleasure to entertain you when you are in the city.

Very truly yours,

Edward D. Jones

EDJ:lo Chairman of the Board [104]

Brewery President Visits Certified; Lauds Organization

Mr. Edward Jones, President of the Griesedieck Western Brewery Company of Belleville, Ill., and St. Louis, Missouri, brewers of Hyde Park "75" and Stag (sugar-free) beer, recently visited Certified's headquarters on his trip to the west coast.

Mr. Jones spent several days surveying the merchandising job being done on the two fine beers in California. He visited thirty or forty markets in the area and thought them to be phenomenal and commented on the good housekeeping in them and the fine merchandising of beer which is becoming a taster selling grocery item every day. He said the eyes of the east would be upon the west as a criteria for advanced and improved methods in distribution of beer, stating that the east could easily pattern California in the pursuit of better displays, better merchandising and better sales.

The brewery president was impressed with the size, efficiency, and volume of Certified Grocers and was amazed at the headquarters' facilities. He expressed appreciation of the good will of Certified members and offered any assistance that his firm could render to help promote the beers distributed through Certified.

Taking cognizance of the fact that Certified works on a volume basis, Mr. Jones pointed to his firm's similar belief that business thrives on turnover rather than the difference between cost and selling price.

HYDE PARK "75" REPRESENTATIVES—On his recent visit to Certified's warehouse and beer division, Mr. Edward Jones, second from left, President of the Griesedieck Western Brewing Co., was photographed in front of the Hyde Park stock with (from left) J. Murray Yunker, Certified first vice-president and assistant general manager; and William R. LeVecke and Reed LeVecke, west coast representatives.

Display Contest

(Cont'd from page one)

All you have to do is to set up an eye-catching display featuring a variety of Aerowax no rub wax, Aerowax paste wax and Wizard Wick in the various sizes. The variety and size of items displayed will be a big factor in the judging. Have your display photographed and submit it to the Advertising Department at Certified by December 10th. If you need help in arranging for a photograph, Western Family magazine is willing to give you that assistance. Simply call Western Family magazine and request that a photograph of your display be taken.

Rules, entry blanks and other details of the contest have been mailed to each member with the Certified bulletin. Watch your bulletin for details.

Many Non-Food Items Belong In Markets

Many so-called "non-food items" won't be known by that tag for very long at the rate their sales are increasing in food stores. The one-stop shopping trend and self-service in grocery stores is revolutionizing the retail trade. There's plenty of proof now that certain "non-food" items belong in markets because that's where the customer wants to do her shopping. After all, its the public vote that counts, and its been proven that more people "vote" on their preferences for brands of cigarettes than vote for the President of the United States. Consumer choice is the real voting power in our economy and democratic way of life.

What do other publications say about this trend?

"Printer's Ink" says:

The expanding role of the super market in distribution and the impact its self-service and self-selection techniques must inevitably make on advertising techniques, have yet to be fully appreciated by both merchandising and advertising men. The super market is unquestionably revolutionizing retailing.

1. The super market will eventually compel all mass retailing to go self-service and self-selection. Already the drug chains, the variety chains and even department stores, to a limited extent, are testing self-service. Walgreen's is rapidly expanding its self-service stores.

"2. *The super market sells more beer than milk!* It's the Number 1 outlet for cigarettes, soft drinks, candy. It already sells some 30% of the total volume on a few drug items. It is a big factor in housewares, toys, paper items, household items, etc.

"3. The super market is destined to become a junior department store. Several super market chains are already deep in this expansion. Weingarten's in Texas is the outstanding example. Indeed, in its trading area, many soft goods and hard goods lines can no longer obtain adequate distribution unless they take on Weingarten's.

(Cont'd on page 7, Col. 1)

EXHIBIT "F"

EXHIBIT "E"

[Letterhead of Greisedieck Western Brewery Company]

Mr. Wm. LeVecke April 17, 1953
LeVecke Distributing Co.
1807 East Olympic Boulevard
Los Angeles, California

Dear Bill:

During the month of March the following persons purchased Griesedieck Western Brewing Company stock:

Ralph V. Erdman, 874 Highera St., San Luis Obispo, California.

John P. MacCrossen & Mrs. Laverne C. MacCrossen, 202 Barbara Ct., Concord, California.

A letter of welcome into the "family" of stockholders was written these people telling them you are our representative and that you sell Safeway Stores, and to contact you for any further information.

Yours sincerely,

/s/ Edward D. Jones

EDJ:ES Chairman of the Board [113]

[Letterhead of Griesedieck Western Brewery Company]

Mr. Wm. LeVecke July 20, 1953
LeVecke Distributing Company
1807 E. Olympic Blvd., Los Angeles, California

Dear Bill:

I thought you might be interested in the enclosed

Exhibit "E"—(Continued)

letter from Mr. Norman Porter of Torrance, California. Of course, we are not interested in his proposition, but thought you might want to get in touch with him if you are in that vicinity.

With kindest regards, I am,

Sincerely yours,

Griesedieck Western Brewery Co.
/s/ Hans, Vice-President

HJSaemann:bs—Enc. [114]

[Written in Longhand]

Mail to LeVecke

Norman Porter, 5304 Doris Way
Torrance, Calif., July 13, 1953

Hyde Park Breweries Ass'n.
St. Louis, Missouri

Dear Sir:

I would greatly appreciate if you would sponsor me for a Catalina Channel Swim.

This feat could be used as an advertising purpose. I'm confident that I can cover the distance.

Personal Record—I was born in St. Louis, Missouri, and attended the Bryn Hill School until the age of eleven, when my folks moved to Chicago where I finished my elementary schooling. Attended High Schools Lindbloom & Austin, graduating from Austin. Total college—2 years in Engineering Sub-

Exhibit "E"—(Continued)

jects (nights). I drink beer moderately and one of my favorites is Hyde Park.

Athletic Record—Swam in pools at St. Louis but got my best early experience in the Mississippi River. I made [115] long distance swims in Lake Michigan. Won 2nd place in Chicago Elementary School Wrestling, and 3rd place in the Open Division for S. W. District Chicago Amateur.

You are welcome to test my ability by having one of your agents contact me in this area (my Phone No. FRontier 5-1281). Please make me an offer. I'm sure that this would greatly increase sales of Hyde Park Beer in this area.

Yours very truly,

/s/ Norman Porter

Mr. Norman Porter, August 4, 1953
5304 Doris Way, Torrance, California

Dear Mr. Porter,

The letter which you sent to the Hyde Park Breweries in St. Louis has been forwarded to us and we are very pleased with your interest in Hyde Park beer.

At the present time our program does not afford a sponsorship such as the one you mention in the 'Catalina Channel Swim' but we shall keep your letter in our files and if ever the occasion for such type publicity would arise we will certainly get in touch with you.

You can be assistant to us in the meantime, Nor-

Exhibit "E"—(Continued)

man by recommending Hyde Park and Stag beers to your friends and associates and if ever you are in the vicinity of our Los Angeles office, The LeVecke Company, 1807 E. Olympic Blvd., Los Angeles 21, California, Room 205, we would be ever so glad to have you stop in to see us.

Very truly yours,

MRL/s The LeVecke Company [117]

EXHIBIT "F"

Mr. Robert Fielding October 19, 1953
United Grocers, Ltd.
685 Sixth Street, San Francisco, California

Dear Bob:

I want to thank you on behalf of Mr. William LeVecke and myself for giving us some of your valuable time on my recent visit to San Francisco. It is always gratifying to me to have an opportunity to exchange ideas with a good merchant like yourself.

Our firm and Mr. LeVecke's organization have and are developing additional merchandising gimmicks for the promotion and sale of beer on premise. We have outlined a comprehensive program and Mr. LeVecke will be happy to go over these plans with you on his next visit to San Francisco.

Let me compliment your firm's policy and the store manager's fine housekeeping throughout the entire area.

Exhibit "F"—(Continued)

I again want to thank you and your organization for the fine business you have been entrusting to us and you may be sure we appreciate this confidence.

Without being egotistical, we are happy to report that our business in your area so far this year is twice what it was in a similar period last year.

Anytime you are in the St. Louis area, I hope you will let us show you our fine facilities, and it will be a pleasure to entertain you when you are in the city.

Very truly yours,

Edward D. Jones

EDJ:lo Chairman of the Board [118]

[Letterhead of Griesedieck Western Brewery Company]

Mr. William LeVecke October 29, 1952
The LeVecke Dist. Co.
1807 East Olympic Blvd., Los Angeles, Calif.

Dear Bill:

Mr. Jones showed me photographs of your new service panel trucks, and they certainly are outstanding. Stag and Hyde Park are certainly getting a lot of advertising value from them.

I would like to offer one suggestion on any future trucks which you have made up; namely, that the Stag copy be segregated from the "75" copy. The

Exhibit "F"—(Continued)

sugar-free copy could be combined with Stag on one side and the Premium Pale Beer at Popular Price combined with the "75" emblem on the other side, or at least segregated in such a way that people will know which is the Sugar-Free beer and which is the Premium Pale Beer. I trust you will appreciate the spirit in which this suggestion is offered, and if we can be of any help in this connection, we will be happy to do so.

As usual, Mr. Jones returned from his trip to the West very much enthused about your operation, and as he put it "we have only scratched the surface." One of these days I hope to have the opportunity of coming out and seeing your operation first hand. In the meantime, with kindest regards to you and your family, I am,

Sincerely yours,

Griesedieck Western Brewery Company
/s/ Hans Saemann
Assistant Advertising Manager

HJSaemann:ak [119]

Exhibit G consists of a Book of Invoices (Original and Duplicate) numbered from C17601 to and inclusive of C17650.

CITY DELIVERY—BOTTLED BEER INVOICE

Received in good order from

GRIESEDIECK WESTERN BREWERY COMPANY

3607 N. FLORISSANT AVE. GArfield 0370

St. Louis 7, Mo., _____ 195__

Sold to _____

Address _____

Mo. Lic. No. Terms

3.2%	5%	CASES STAG BEER	AMOUNT
		24-12 oz. Exports	
		24-12 oz. Cans	
		12-12 oz. Cans	
		12-12 oz. One Ways	
		4-6 One Ways	
		12-32 oz. Quarts	

Cash Refund | | Total Charges

QUAN.	EMPTIES RETURNED
	Cases with 24-12 oz. Bottles

Export Cases and Bottles not sold but remain the property of G. W. B. CO.

Allowances

Cash

Total Credits

Balance

CUSTOMER'S SIGNATURE

DRIVER'S SIGNATURE

C 17601

D-3-5 351893 THE FLESH CO., ST. LOUIS 1, MO

120

EXHIBIT "G"

EXHIBIT "H"

ORDER CONFIRMATION

TO:

THANK YOU FOR YOUR ORDER #_____

FOR THE FOLLOWING ITEMS

HYDE PARK "75" BEER		STAG BEER
_____	24/12oz cans	_____
_____	12/12oz cans	_____
_____	24/12oz 4/6 cans	_____
_____	48/12oz 8/6 cans	_____
_____	24/12oz 4/6 1 way bot.	_____
_____	12/12oz 1 way bot.	_____
_____	12/32oz 1 way qt bot.	_____

STOUT "75" MALT LIQUOR_____

THIS ORDER IS BEING SHIPPED ON_____

AND SHOULD REACH YOUR WAREHOUSE BY_____

GRIESEDIECK WESTERN BREWERY CO.

By:

EXHIBIT "H"

EXHIBIT "I"

GRIESEDIECK WESTERN BREWERY COMPANY

3607 NORTH FLORISSANT • ST. LOUIS 7, MISSOURI • TELEPHONE: GARFIELD 0370

OUR PRODUCTS ARE SOLD ON ORDER-TO-ORDER BASIS ONLY. WE ISSUE NO CONTRACTS, AGENCIES, OR FRANCHISES.

EXHIBIT "I"

HYDE PARK 75

GRIESEDIECK WESTERN BREWERY COMPANY

2337 NORTH FLORISSANT • ST. LOUIS 7, MISSOURI • TELEPHONE: GARFIELD 0272

August 4, 1952

Mr. Reed J. LeVecke
The LeVecke Distributing Co.
1807 E. Olympic Blvd.
Los Angeles, California.

Dear Reed:

As per your letter of August 1st, we have today instructed the printer to send you a thousand each of the Hyde Park and Stag blank business cards. They have promised to get them out to you today, so they should be in your hands within the next few days.

Kindest regards.

Very truly yours,

GRIESEDIECK WESTERN BREWERY CO.

H.J. Baemann

Assistant Advertising Manager

HJSaemann:bs

EXHIBIT "K"

[Western Union Telegram]

LSA034 OB084 1954 Sep 30 AM 2 31

O.SFNO81 NL PD-FAX San Francisco Calif 29

William R LeVecke, LeVecke Dist Co—
1807 East Olympic Blvd LOSA—

We Have Been Selling Stag In Fresno At 15 Cents, 6/90 Cents. Do You Want Us To Raise To 17 Cents, 6/99 cents?—

—C H Jones Drexel Distributing Company

15 Cents 6/90 Cents 17 Cents 6/99 Cents?—

EXHIBIT "L"

[Letterhead of Drexel Distributing Company]

Mr. William R. LeVecke Feb. 17, 1954
LeVecke Distributing Company
1807 East Olympic Blvd., Los Angeles 21, Calif.

Dear Bill:

On Invoice No. 9040 dated December 14, 1953, for 540 cases of 8/6/12 oz. cans Stag beer, we were billed at $4.80. Previous to that the price had been $4.60. This particular shipment was a drop shipment, and as a result the billing price was possibly billed at the higher rate. If this is the case, please let us know so that the Accounting Department can mark their records accordingly. However, if the amount was in error, we probably should receive credit for the difference.

Exhibit "L"—(Continued)

Can you look into this and let us know what the correct price on that particular shipment was at your first opportunity.

Very truly yours,

Drexel Distributing Company

CHJ/iw /s/ C. H. Jones [125]

[Letterhead of Drexel Distributing Company]

Mr. William R. LeVecke April 30, 1954
LeVecke Distributing Company
1807 East Olympic Blvd., Los Angeles 21, Calif.

Dear Bill:

The Stag movable sign was accepted by the Fresno Zone, and they would like to have twenty-seven of them to place in their stores.

Can you arrange to have that number delivered to the Zone office at 160 South Fulton St. in Fresno?

Have the signs sent to the attention of Bob Hurlburt, or if one of your merchandising crew could call on Mr. Hurlburt he can give him the details as to how they should be handled.

Very truly yours,

Drexel Distributing Company

CHJ/iw /s/ Chuck Jones [126]

Mr. C. H. Jones May 3, 1954
Drexel Distributing Company
609 Sutter St., San Francisco 2, California

Dear Chuck,

Thank you for your letter of April 30th. We

Exhibit "L"—(Continued)

were certainly glad to learn that the Fresno division has accepted the Stag animated sign.

Reed is going to be in Fresno sometime next week, and will deliver the signs to Mr. Hurlburt and assist him in every way possible.

I am going to drop a line to Mr. Hurlburt and tell him of our plans.

Thanks very much, Chuck, and my kindest personal regards.

Yours very truly,

.....

WRL/ms Wm. R. LeVecke [127]

C. H. Jones August 9, 1954
Drexel Distributing Company
609 Sutter St., San Francisco 2, Calif.

Dear Chuck:

Thank you for your letter of August 6 referring to the billing of 1,000 Flat Top can openers.

Please mail the bill for the openers to us.

These openers were shipped to your Arizona division as requested by Mr. Watson.

The openers are to be gratis. The brewery has billed you in error. Please forward the invoice to me for further handling.

Exhibit "L"—(Continued)

My personal regards.

Very truly yours,

.....

William R. LeVecke

WRL/ms—cc: D. Gianuzzi [128]

Acknowledgment of Service attached. [129]

[Endorsed]: Filed April 14, 1955.

[Title of District Court and Cause.]

AFFIDAVIT OF WILLIAM LEVECKE

In Opposition to Motion of Defendant Carling Brewing Company To Set Aside, Vacate and Quash Service of Summons and Complaint and Notice of Motion and Motion to Dismiss

William LeVecke, being first duly sworn, deposes and says:

That he is one of the plaintiffs in the above entitled action.

That defendant Carling Brewing Company has at all times mentioned in said action and now has an office and employees in the State of California. Said employees supervise, advertise and aid the sale of said defendant's beer products, and control the prices thereof, in the State of California and are paid by defendant for this service. The employees of said defendant in the State of California per-

form services for said defendant as more fully outlined in the affidavit of Ian R. Dowie attached to said defendant's notice of motion to set aside, vacate and squash service of summons and complaint. Said defendant's California office has been and now is at 6339 Wilshire Boulevard in Los Angeles, California, and said defendant has had, and now has, a telephone listing at that address.

That the business done by said defendant in the State of California was, and is, a substantial part of its business, and because of the amount of business done in California, the said defendant regards California as one of its chief markets.

On about September 23, 1954, defendant Griesedieck Western Brewery Company informed plaintiffs that defendant Carling Brewing Company had offered to purchase the assets of Griesedieck Western Brewery Company. It stated that if this purchase was accomplished that there would be no change of any kind in the beer products that would be sold, and that plaintiffs would maintain the same relationship with defendant Carling Brewing Company as it had with defendant Griesedieck Western Brewery Company.

On September 23, 1954, plaintiffs were notified by defendant Griesedieck Western Brewery Company that defendant Carling Brewing Company had purchased the business and assets of Griesedieck Western Brewery Company.

After receipt of the notice of said sale as aforesaid, affiant telephoned to Edward D. Jones, Chairman of the Board of Directors of defendant Griese-

dieck Western Brewery Company. Affiant asked Mr. Jones about the sale. Mr. Jones told affiant that there would be no change in the contract between his company and affiant and to keep right on selling beer as before. Mr. Jones further said, "I have you before me at all times" and that affiant's relationship with defendant Carling Brewing Company would be the same as it had been with his company. Mr. Jones said that he had sent a notice of said sale to all of defendant Griesedieck Western Brewery Company's large wholesale and retail accounts in California because he wanted affiant and the others to know about it and not to become concerned because of said sale and did not want them to get the information second handed from the Wall Street Journal.

On or about October 25, 1954, L. D. Ballew, General Sales Manager of defendant Carling Brewing Company, telephoned to affiant and told affiant that he would be in Los Angeles on October 28, 1954 to meet him and discuss business plans with affiant. The said Ballew confirmed this meeting by telegram on October 27, 1954, a copy of which is attached hereto as Exhibit 3.

On October 28, 1954, the said General Sales Manager of defendant Carling Brewing Company, met with plaintiffs and at that time told them that the said defendant Carling Brewing Company was not going to ship any more Hyde Park or Stag brand beers, which plaintiffs had been selling for the other defendant, to California or Arizona, and that his company would not ship the beer which had already

been ordered by plaintiffs. He then told plaintiffs that his company was terminating the contract with plaintiffs. Before telling them of the termination, he asked plaintiffs if they had any other means of livelihood. Plaintiffs told him they did not. That Reed LeVecke, one of the plaintiffs, asked the said Ballew if he did not think it highly unethical to cancel their contract on a minute's notice. Mr. Ballew said yes it was unethical, but that was the way it was going to be and that defendant Carling Brewing Company was taking over the California business. Mr. Reed LeVecke then told Mr. Ballew that he was stealing the business and terminating their contract without a gun.

The following day the said Ballew called on all of the customers that plaintiffs had been selling beer to in Los Angeles and told them that plaintiffs had been cancelled out and would receive no more Hyde Park or Stag Beer and that defendant Carling Brewing Company was taking over all such sales.

On or about September 27, 1954, defendant Carling Brewing Company wrote to plaintiffs and told them of its negotiations to purchase the assets of defendant Griesedieck Western Brewery Company and that if this was accomplished that there would be no changes of any kind and that the same relationship that plaintiffs had with defendant Griesedieck Western Brewery Company would be maintained with defendant Carling Brewing Company. A copy of this letter is attached hereto as Exhibit 1.

On or about October 29, 1954, defendant Griesedieck Western Brewery Company notified plain-

tiffs that the sale to defendant Carling Brewing Company had been consummated. A copy of said letter is attached hereto as Exhibit 2.

The plaintiffs' contract was terminated by said defendant Carling Brewing Company through its agents in California, and the acts and wrongs committed against plaintiffs by said defendants, of which plaintiffs complain, occurred in California.

/s/ WILLIAM LEVECKE

Subscribed and sworn to before me this 15th day of April, 1955.

[Seal] /s/ BELLE KENNICOTT

EXHIBIT No. 1

[Letterhead of Carling Brewing Company]

September 27, 1954

Dear Friend:

I know that Mr. Edward D. Jones has written to tell you of the negotiations now in progress between the Carling Brewing Company and the Griesedieck Western Brewery Company. My purpose in writing you at this time is to extend you a friendly welcoming hand, and to tell you something about the Carling Brewing Company. I hope that I shall have an opportunity to meet and greet you personally, but meanwhile I hope this will serve as an introduction to a cordial and lasting relationship between us.

You will agree, I am sure, that the success and security of a distributor depends largely upon the

ambition, resources and effectiveness of the brewery with which he is associated. It will be gratifying to you to review Carling's record, particularly in the past four years.

Between 1949 and 1953 the Carling Brewing Company has advanced from 64th position to 19th in the industry. This year we have completed a $3,000,000 expansion program in our Cleveland plant, and have started the construction of a multi-million dollar plant in Natick, Massachusetts, that will be ready for production in 1956. The completion of our current negotiation with the Griesedieck Western Brewery Company would immediately place Carling's among the top ten brewing companies in this country.

You will be interested to learn that even this advanced position in American brewing does not tell the whole story of Carling's strength, for there are eminently successful Carling breweries in Canada and in England. Carling's is sold in many countries throughout the world.

My purpose in telling you all this is not to boast of past achievements, but to demonstrate to you that the company with which you will be affiliated has the resources, the experience and the record to support its ambitions.

I want also to confirm what Mr. Jones wrote you with regard to our plans insofar as they affect Stag Beer. No changes of any kind are contemplated. With your help we intend to intensity and revitalize the promotional, merchandising and adver-

tising effort in support of Stag Beer sales in your area.

If the shareholders of the Griesedieck Western Brewery Company accept the recommendation of the board, we shall be in contact with you as promptly as possible to plan our future strategy together.

In the meantime, please accept this cordial greeting, and my sincere hope that we may work together, happily and successfully for many years to come.

Sincerely yours,

/s/ Ian R. Dowie, President

EXHIBIT No. 2

[Letterhead of Griesedieck Western Brewery Company]

October 29, 1954

To Our Hyde Park "75" Distributors:

I am writing to advise you that the negotiations between this company and the Carling Brewing Company, about which I recently informed you, have now been consummated. Carling's will assume operation of our plants on Monday, November 1st.

Many of our distributors have already had an opportunity to meet Ian R. Dowie, President of Carling's, and I know they will agree with me when I tell you that Mr. Dowie and the organization he heads are friendly, dynamic and of highest integrity. I am confident that your relationship with Carlings will be both profitable and pleasurable.

I want to take this opportunity to thank you for

your loyalty and support. I hope that you will continue with Carling's in the same fine spirit. Your cooperation with them will be a personal favor to me and to every member of our organization.

I am retiring from brewing activities and will devote my time to my brokerage business, and, you can feel free to address me on any subject at any time in care of: Edward D. Jones & Company, 300 North 4th Street, St. Louis, Missouri.

With my sincere wish for your continued success, I am,

Cordially yours,

Griesdieck Western Brewery Co.
/s/ Edward D. Jones,
EDJ:ms Chairman of the Board

EXHIBIT No. 3

LA022 CIB100 1954 Oct 27 AM 8 54
CT.CLD098 Pd-Wux Cleveland Ohio 27 1105 Ame

William R LeVecke—LeVecke Co
1807 East Olympic Blvd LosA—

I Have Reservations Confirmed At The Town House in Los Angeles For Thursday October 28 And Wish To Suggest That We Proceed From Airport To Town House For Dinner And General Business Discussion Please Wire Acknowledgment—

L D Ballew Carling Brewing Co.

Acknowledgment of Service attached.

[Endorsed]: Filed April 15, 1955.

[Title of District Court and Cause.]

AFFIDAVIT OF L. D. BALLEW

State of Ohio,
Cuyahoga County—ss:

L. D. Ballew, being first duly sworn on his oath says:

1. I reside in Sagamore Hills, Northfield, Summit County, Ohio. I am General Sales Manager of the Carling Brewing Company and I have held such position with said corporation since August 1949 including all times referred to in the complaint, and am presently General Sales Manager of said corporation. I have personal knowledge of the facts stated herein.

2. Answering the Affidavit filed herein sworn to by William Le Vecke I admit that on or about October 25, 1954 I telephoned to said William Le Vecke and advised him that I would be in Los Angeles on October 28, 1954. I further admit that the telegram attached to the said Affidavit to William Le Vecke and marked Exhibit 3 was sent to William Le Vecke by me.

3. Further answering the said Affidavit of said William Le Vecke, I admit that I did meet the said William Le Vecke and his son, Reed Le Vecke, in Los Angeles, California, on Thursday evening, October 28, 1954. I further state that the said Le Veckes met me upon arrival by airplane at the Los Angeles airport, drove me to my hotel, The Town House, in Los Angeles, that they were my guests at

dinner in my suite of rooms at the Town House; that during and following said dinner they, the said Le Veckes, explained to me the efforts they had made in the past on behalf of the products of Griesedieck Western Brewery Company, and of their desire to continue to sell the said products for Carling Brewing Company after said last named company, my employer, acquired the brewery properties of Griesedieck Western Brewery Company at St. Louis, Missouri, and Belleville, Illinois on November 1, 1954. [131]

4. Having heard fully the presentation by the said Le Veckes made by them at the aforestated Town House meeting including their request that the Carling Brewing Company continue to do business with them in connection with said Griesedieck Western Brewery Company products namely Stag Beer and Hyde Park Beer, I informed the said Le Veckes that the Carling Brewing Company had no present intention of continuing the sale of said Stag Beer and Hyde Park Beer in the western states of the United States including the States of California and Arizona. I further informed them that, in view of the foregoing, Carling Brewing Company would not after its acquisition of said brewery properties in St. Louis, Missouri, and Belleville, Illinois, and the right to manufacture therefrom or from any other plant of Carling Brewing Company the said Stag Beer and Hyde Park Beer have any business relationship with the said Le Veckes or either of them in any capacity whatsoever.

5. Further answering the said Affidavit of William Le Vecke, Affiant denies that he told said Le Veckes or either of them that Carling Brewing Company was terminating any contract with them, and Affiant says further that no contract ever existed by and between Carling Brewing Company and said Le Veckes or either of them. Further, this Affiant denies that he asked said Le Veckes if they had any other means of livelihood, but this Affiant says that the said Le Veckes did represent to him that the business which they had been engaged in and were then engaged in with regard to sales of Stag Beer and Hyde Park Beer was the only business they were then engaged in.

6. Further answering said Affidavit of William Le Vecke, this Affiant says that the Le Veckes complained to him bitterly at said meeting because they were not to be afforded the opportunity and right to sell said Stag Beer and Hyde Park Beer after said products and said brewing properties of Griesedieck Western Brewery Company had been acquired by Carling Brewing Company, but Affiant emphatically denies that anything was said at any time about the cancellation of any contract which they had or claimed to [132] have with Carling Brewing Company and Affiant repeats his former statement that there was no contract exxisting by and between the Le Veckes and Carling Brewing Company and that also as aforesaid Affiant made it perfectly clear to the Le Veckes that there would be no contract or any other business relationship with the Le Veckes by and between them and the Carling Brewing

Company on November 1, 1954 or at any other time. Further, Affiant denies that he made any statement to the effect or which could be interpreted as meaning that what he was saying to them was in any way unethical on the part of Carling Brewing Company or this Affiant. Also, this Affiant denies that Mr. Reed Le Vecke told him that he was stealing their business and terminating their contract without a gun.

7. During the several days this Affiant was in Los Angeles following the aforementioned Town House meeting with the said Le Veckes, he called upon several distributors some of whom were then handling the Carling Brewing Company products Carling's Red Cap Ale and Carling's Black Label Beer. One such distributor and one only, R. E. Spriggs, was to this Affiant's personal knowledge also a distributor of products of Griesedieck Western Brewery Company. Affiant says that he had informed said R. E. Spriggs that on and after November 1, 1954 upon which date the Griesedieck Western Brewery Company properties were to be acquired by Carling Brewing Company as aforesaid, the Carling Brewing Company was not then planning to continue the sale of either Stag Beer or Hyde Park Beer in the western states including the State of California. Affiant denies that he called on all of the customers of the said Le Veckes to whom they had been selling beer in Los Angeles and told said distributors that the Le Veckes had been "cancelled out" and would receive no more Hyde Park Beer or Stag Beer and that the Carling Brew-

ing Company was taking over all such sales. To reiterate the foregoing, only one distributor was called upon who in addition to handling Red Cap Ale and Black Label Beer also handled one or more of the products of Griesedieck Western Brewery Company and to him, namely the said R. E. Spriggs, the [133] statements were as stated above plus the clear explanation that William Le Vecke and Reed Le Vecke, nor neither of them, then represented nor would represent Carling Brewing Company in any capacity whatsoever or with regard to any products of Carling Brewing Company after November 1, 1954.

8. Affiant says that to his personal knowledge the letter dated September 27, 1954 attached to the said Affidavit of William Le Vecke as Exhibit 1 was sent over the signature of Ian R. Dowie, president of Carling Brewing Company, to certain distributors of the Griesedieck Western Brewery Company, but Affiant says he does not know whether a copy of said letter was sent to or received by the Le Veckes or either of them. However, Affiant says that at said Town House meeting with the Le Veckes reference was made by one or both of the Le Veckes to said letter. The Le Veckes commenting with regard thereof and indicating an expectation on their part that based upon the content of said letter, they had expected to be afforded the opportunity and right to sell Stag Beer and/or Hyde Park Beer in the States of California and Arizona in a business relationship with Carling Brewing Company. Affiant says that as stated above and without reser-

vation on account of any interpretation which they may have made of said letter or any other communication or general impression which they had received, it was made clear to the Le Veckes on October 28, 1954 that it was not as of the date of said Town House meeting the plan or intention of Carling Brewing Company to sell any Stag Beer or Hyde Park Beer in the western states including the States of California and Arizona after November 1, 1954 and further it was made clear by this Affiant to said Le Veckes that there was not then nor would there be after November 1, 1954 any business relationship whatsoever by and between the Le Veckes or either of them and Carling Brewing Company.

9. Further Affiant saith not.

/s/ L. D. BALLEW

Subscribed and sworn to before me, a Notary Public in and for the State of Ohio, this 19th day of April, 1955.

[Seal] /s/ JOHN LADD DEAN,
Notary Public [134]

Affidavit of Service by Mail attached. [135]

[Endorsed]: Filed April 21, 1955.

[Title of District Court and Cause.]

AFFIDAVIT OF ARNOLD E. WACHTER

State of Missouri,
City of St. Louis—ss.

Arnold E. Wachter, being first duly sworn, on his oath says:

1. I reside at 7405 Wellington Way, Clayton, Missouri. I am employed by the Cavanagh Printing Company of St. Louis, Missouri and was employed by that Company as a salesman in 1952 and prior thereto. I was in charge of the Griesedieck Western Brewery Company account and responsible for orders received from that company.

2. On August 20, 1952, in response to order from Griesedieck Western Brewery Company, the Cavanagh Printing Company mailed by parcel post to Mr. Reed LeVecke, The LeVecke Distributing Company, 1807 East Olympic Boulevard, Los Angeles, California, two thousand business cards. These cards were blank except that the Hyde Park "75" beer trade-mark was printed on one thousand of them and the Stag beer trade-mark was printed on the other one thousand. There was no other printing on the cards when they were mailed to The LeVecke Distributing Company. The blank business cards which are attached as Exhibits 1 and 2 to my affidavit are exact reproductions of the cards which were mailed to The LeVecke Distributing Company on August 20, 1952.

3. I have examined the business card which is

attached as part of Exhibit J to the affidavit of Reed LeVecke. None of the printing on said card, other than the colored trade-mark, was placed on said card by Cavanagh Printing Company.

4. I have personal knowledge of the fact that Cavanagh Printing Company printed large numbers of said blank business cards, with the Stag or Hyde Park trade-mark on them, for delivery in various parts of the country to distributors of beer manufactured by Griesedieck Western Brewery Company. In all such instances the business cards were blank except for the printed trade-mark.

/s/ ARNOLD E. WACHTER [137]

Subscribed and sworn to before me, a notary public in and for the City of St. Louis, State of Missouri, this 27th day of April, 1955.

[Seal] /s/ BETTY PROCTOR,
Notary Public [138]

Acknowledgment of Service attached. [140]

[Endorsed]: Filed April 28, 1955.


Stag
BEER


75

[Title of District Court and Cause.]

AFFIDAVIT OF EDWARD D. JONES

State of Missouri,
City of St. Louis—ss:

Edward D. Jones, being first duly sworn, on his oath says:

1. I reside at 6341 Ellenwood Avenue, St. Louis County, Missouri. I am President of The Griesedieck Company, formerly Griesedieck Western Brewery Company, and I have been the Chief Executive Officer of said corporation from 1944 to date and at all times referred to in the complaint. During said period I held the offices of President and Chairman of the Board of said corporation. I have read the affidavits of William R. LeVecke and Reed LeVecke, dated April 13, 1955, and I have examined the exhibits attached to said affidavits. I have personal knowledge of the facts which are stated herein in reply to said affidavits and exhibits.

2. With reference to the affidavit of William R. LeVecke, I did make the trips to California in October of 1951, 1952 and 1953 and in November of 1953, which are referred to on pages 2, 3, 4, 5 and 6 of said affidavit. Each of said trips was made at the request of Mr. William R. LeVecke and on his suggestion that such trips would benefit his business as an independent distributor of the beer produced by Griesedieck Western Brewery Company. I made the trips primarily for that purpose and because any increase in Mr. LeVecke's business in the State

of California would result in increased distribution of the products of Griesedieck Western Brewery Company.

3. The various business calls described in the affidavit of William R. LeVecke, on each of my trips to [142] California, were made at the request of Mr. LeVecke and as a means of promoting good will with his customers. During said visits I did not at any time make any sales of beer in California on behalf of Griesedieck Western Brewery Company nor did I solicit any orders for Griesedieck Western Brewery Company. In each instance, I did what I could to maintain and to enhance the business which Mr. LeVecke was doing with his customers upon whom we called.

4. I made only four such trips to California in the five-year period during which William R. LeVecke was a distributor of Hyde Park and Stag Beer. No other officer or employee of Griesedieck Western Brewery Company visited California for such purpose, other than the one instance in November, 1953, when Mr. Henry G. Sewing, Jr., Merchandising Manager of said company, accompanied me in response to the invitation of William R. LeVecke. The purpose of Mr. Sewing's visit was to acquaint him with the fine merchandising methods used by Mr. LeVecke, which I felt could be adopted by Griesedieck Western Brewery Company in its own sales efforts in Missouri and in Illinois. The affidavit of William R. LeVecke represents that the visits made by me to California, which are described therein, are "typical of the

sales efforts of said defendant in this state". (See affidavit of William R. LeVecke, page 2, lines 2-5). In fact, the visits described in said affidavit are the only trips which I or any other officer or employee of the Griesedieck Western Brewery Company ever made to California during said period on the business of said company.

5. Reference is made to the statement by William R. LeVecke that Griesedieck Western Brewery Company "regarded California as one of its chief markets" (see [143] affidavit of William R. LeVecke, page 6, lines 24-28). During the period 1950 to 1954 the volume of shipments by Griesedieck Western Brewery Company to California was less than one (1) per cent of the total sales of said company in each of said years.

6. I reaffirm as true and correct each statement made in my previous affidavit dated March 30, 1955 and on file in this cause. I deny, as untrue and incorrect, the numerous generalizations and conclusions contained in the said affidavits of William R. LeVecke and Reed LeVecke in regard to the relationship of The LeVecke Company to Griesedieck Western Brewery Company. I have limited this reply to the above statements because the said affidavits do not specify any particular fact, event or documents which support such generalizations and conclusions.

/s/ EDWARD D. JONES

Subscribed and sworn to before me, a notary public in and for the City of St. Louis, State of Missouri, this 27th day of April, 1955.

[Seal] /s/ HAMILTON GROSSE,
Notary Public [144]

Acknowledgment of Service attached. [145]

[Endorsed]: Filed April 28, 1955.

[Title of District Court and Cause.]

AFFIDAVIT OF MELVIN B. FEIG

State of Missouri
City of St. Louis—ss.

Melvin B. Feig, being first duly sworn, on his oath says:

1. I reside at Collinsville, Illinois. I was the Credit Manager of Griesedieck Western Brewery Company (now named The Griesedieck Company) from 1950 to November 1, 1954 and had supervision of the records relating to the shipments of merchandise by said company to California during said period. I have read the affidavits of William R. LeVecke and Reed LeVecke dated April 13, 1955 and I have examined the exhibits referred to in said affidavits.

2. With reference to the statement made by William R. LeVecke in regard to the volume of business done by Griesedieck Western Brewery Company with purchasers located in the State of California (William R. LeVecke affidavit, page 6, lines

24-28) the records of that company show that in each year from 1950 through 1954 the volume of beer shipped by Griesedieck Western Brewery Company into the State of California was less than 1% of the total sales of beer by said company in each of said years.

3. With reference to Exhibit L to the affidavit of William R. LeVecke and to the statement made by William R. LeVecke about said exhibit (see affidavit of William R. LeVecke, page 7, lines 1-7), I have examined the first letter appearing as part of Exhibit L, being the letter of February 17, 1954, written by Drexel Distributing Company to Mr. William R. LeVecke. That letter and the text of William R. LeVecke's affidavit referring to it are used to represent that Griesedieck Western Brewery Company had some dispute with Drexel Distributing Company over the Invoice No. 9040, described in said letter. I have no knowledge of any such dispute; the records of the company, under my supervision, do not disclose any such dispute; the records of the company do not contain any copy of the invoice referred to in [147] said letter or any correspondence relating to said invoice; the invoices used by Griesedieck Western Brewery Company for shipments in December 1953 did not include an invoice numbered 9040 and the serial numbers used by the company at that time did not have any No. 9040 in the numerical sequence which was followed. To the best of my information and belief, the invoice No. 9040 referred to in said letter appearing as part of Exhibit L to the affidavit of William R.

LeVecke was not an invoice of Griesedieck Western Brewery Company.

/s/ MELVIN B. FEIG

Subscribed and sworn to before me, a notary public in and for the City of St. Louis, State of Missouri, on this 28th day of April, 1955.

[Seal] /s/ BETTY PROCTOR,
Notary Public [148]

Acknowledgment of Service attached. [149]

[Endorsed]: Filed April 29, 1955.

[Title of District Court and Cause.]

AFFIDAVIT OF HANS J. SAEMANN

State of Missouri,
City of St. Louis—ss.

Hans J. Saemann, being first duly sworn, on his oath says:

1. I reside at 8609 Mayflower Court, St. Louis, Missouri. I was Assistant Advertising Manager of Griesedieck Western Brewery Company in August, 1952. I have personal knowledge of the facts stated herein.

2. I have examined Exhibit J to the affidavit of Reed LeVecke dated April 13, 1955. On or about August 4, 1952, I received a letter from Reed LeVecke of The LeVecke Distributing Company, requesting 2,000 business cards for Hyde Park and

Stag beer. That letter is attached as Exhibit 1 to this affidavit. On August 4, 1952, I wrote Reed LeVecke and a photostat of my letter is attached as part of Exhibit J to the said affidavit of Reed LeVecke. The business card which is attached to said Exhibit J is not a reproduction of the blank business cards referred to in my letter of August 4, 1952, as said cards appeared at the time they were sent to Reed LeVecke.

3. On or about August 4, 1952, I directed the Cavanagh Printing Company at St. Louis, Missouri, to forward to The LeVecke Distributing Company the blank business cards referred to in my letter. The business cards sent by the printing company in accordance with my direction, and in response to this request of Reed LeVecke, were blank except for the colored trade-marks of Stag beer and Hyde Park "75" which trade-marks were printed on the cards by Cavanagh [151] Printing Company. The cards thus sent to The LeVecke Distributing Company were exact copies of the business cards identified as Exhibits 1 and 2 to the affidavit of Arnold E. Wachter, dated April 27, 1955, which affidavit and exhibits I have examined.

4. Neither William R. LeVecke nor Reed J. LeVecke, nor The LeVecke Distributing Company, had authorization from Griesedieck Western Brewery Company to print the name of the said Griesedieck Western Brewery Company on the blank business cards which were forwarded to the LeVeckes. I had no knowledge that the name of Griesedieck Western Brewery Company had been added to these

cards by the LeVeckes until I saw Exhibit J to the affidavit of Reed LeVecke. It was customary for Griesedieck Western Brewery Company to supply distributors of its beer in various parts of the country with blank business cards containing the colored trade-mark for the beer, which card the particular distributor would complete by printing on it the appropriate name and other information relating to his independent company. The Griesedieck Western Brewery Company did not authorize the printing of its name on these blank business cards by The LeVecke Distributing Company or by any other of the independent distributors of its products.

/s/ HANS J. SAEMANN

Subscribed and sworn to before me, a notary public in and for the City of St. Louis, State of Missouri, this 28th day of April, 1955.

[Seal] /s/ BETTY PROCTOR,
Notary Public [152]

EXHIBIT No. 1

[Letterhead of The LeVecke Distributing Co.]

Mr. Hans Saemann August 1, 1952
Griesedieck Western Brewery Co.
3607 North Florissant Ave.
St. Louis 7, Missouri

Dear Hans:

Thank you for your letter of July 30th, stating that the truck decals are on the way.

Please send to us a 1000 each of Hyde Park and Stag blank business cards. We are all out, and must have some for our men in the field, so would appreciate them as soon as possible. Thanks very much.

Kindest regards.

Very truly yours,

THE LEVECKE CO.
/s/ REED J. LeVECKE

RJL:ms [153]

Acknowledgment of Service attached. [154]

[Endorsed]: Filed April 29, 1955.

[Title of District Court and Cause.]

AFFIDAVIT OF HENRY G. SEWING, JR.

State of Missouri,
City of St. Louis—ss.

Henry G. Sewing Jr., being first duly sworn, on his oath says:

1. I reside at 2970 Ridgeview Drive, St. Louis County, Missouri. I was the Merchandising Manager of the Griesedieck Western Brewery Company (now named The Griesedieck Company) from February, 1952, to November 1, 1954; I was the Sales Manager of the Hyde Park Division of Griesedieck Western Brewery Company from July 1, 1950, to February, 1952. I had supervision of all sales made by this company to the plaintiffs and to Drexel Dis-

tributing Company at all times referred to in the complaint. I have personal knowledge of the facts stated herein. I have read the affidavits of William R. LeVecke and Reed LeVecke dated April 13, 1955, and I have examined Exhibits A through L attached to said affidavits. This affidavit of mine is made in reply to said affidavits and exhibits.

2. I identify Exhibit G to the affidavit of Reed LeVecke as the form of sales delivery book used by Griesedieck Western Brewery Company in the City of St. Louis, Missouri. One or more copies of these sales delivery books were obtained from Griesedieck Western Brewery Company by William R. LeVecke or by Reed LeVecke at their request and upon their representation that they wanted to use said delivery book as a form to follow in preparing sales delivery books to be used by their company, The LeVecke Distributing Company, in the conduct of its business in California. Contrary to the statements appearing in the affidavit of Reed LeVecke, page 3, lines 12 to 19, Griesedieck Western Brewery Company did not at any time require the LeVeckes to make delivery of Hyde Park or Stag beer on delivery slips illustrated by said Exhibit G nor did it at any time authorize the LeVeckes or The LeVecke Distributing Company to use sales delivery [156] books printed in the name of Griesedieck Western Brewery Company.

3. Referring to Exhibit H to the affidavit of Reed LeVecke, and to the statements relating to said exhibit appearing on page 3, lines 20 to 24 of

said affidavit, Griesedieck Western Brewery Company did not use a form of "order confirmation" illustrated by said Exhibit H. Said form was not used by Griesedieck Western Brewery Company nor was the use of said form by the LeVeckes or by The LeVecke Distributing Company ever approved by Griesedieck Western Brewery Company. The first time I have ever seen such form was upon examining Exhibit H to the affidavit of Reed LeVecke. I have had my assistants make a thorough investigation of the files, forms, records and correspondence of the Griesedieck Western Brewery Company in this respect and there is nothing to show that Griesedieck Western Brewery Company ever had anything to do with the preparation or use of said Exhibit H by the LeVeckes or by The LeVecke Distributing Company. If said form were used by The LeVecke Distributing Company on "large sales" of beer by it in California, then such use by The LeVecke Distributing Company was for its own purposes and without the knowledge or approval of Griesedieck Western Brewery Company.

4. Referring to Exhibit I to the affidavit of Reed LeVecke and to his statements relating to said exhibit on pages 3-4, lines 25-32, I identify the letterhead and envelope as being representative of stationery used by Griesedieck Western Brewery Company. Cuts of the Hyde Park and Stag beer trademarks were supplied by Griesedieck Western Brewery Company to the LeVeckes and they were auth-

orized to use them on their own business letterhead, as illustrated by the letter from The LeVecke Company which is attached as Exhibit I to this affidavit. The company files contained a request from Reed LeVecke in February, 1954, for a Stag cut and for two hundred Hyde Park 75 and two hundred Stag envelopes. I had no knowledge of this [157] request, but upon questioning former clerical employees of Griesedieck Western Brewery Company I am informed that the materials were sent to the LeVeckes shortly after receipt of the request. I have no knowledge of any request by the LeVeckes for authority to use Griesedieck Western Brewery Company envelopes or letterheads as agents or employees of the Griesedieck Western Brewery Company and no authority was given to the LeVeckes or to The LeVecke Company to use said material in any manner which would represent that they were acting as agents or employees of said company.

5. With reference to the statements appearing on page 4 of the affidavit of Reed LeVecke, lines 8 to 13, the Griesedieck Western Brewery Company did not at any time cause its corporate name to be listed in any telephone directory in California; nor did the Griesedieck Western Brewery Company at any time have knowledge of said listing; nor did Griesedieck Western Brewery Company at any time authorize the LeVeckes or The LeVecke Distributing Company to list the corporate name of Griesedieck Western Brewery Company in any telephone directory. The Griesedieck Western Brewery Company

did not pay the cost of any such listing and if the listing was done, it occurred without the knowledge or consent of said company.

/s/ HENRY G. SEWING, JR.

Subscribed and sworn to before me, a Notary Public in and for the City of St. Louis, State of Missouri, this 30th day of April, 1955.

[Seal] /s/ HAMILTON GROSSE,
Notary Public [158]

EXHIBIT No. 1

[Letterhead of The LeVecke Company]

Mr. Henry Sewing December 14, 1953
Griesedieck Western Brewery Company
3607 North Florissant
Sain Louis 7, Missouri

Dear Henry,

This is to confirm our telephone conversation with you December 10th relative cancellation of our purchase order no. 224.

I will keep you advised.

Very truly yours,

/s/ REED,
/ms/ The LeVecke Company [159]

[Endorsed]: Filed May 2, 1955.

[Title of District Court and Cause.]

AFFIDAVIT OF WILLIAM LeVECKE IN ANSWER TO AFFIDAVIT OF HENRY G. SEWING, JR.

State of California,
County of Los Angeles—ss.

William LeVecke, being first duly sworn, deposes and says:

He is one of the plaintiffs in the above entitled action and has read the affidavit of Henry G. Sewing, Jr., filed in said action, and to said affidavit he makes the following answer of matters of which he has personal knowledge.

The sales delivery books sent to plaintiffs by Griesedieck Western Brewery Company were not one or two in number, as affiant Sewing has stated, but were a whole carton of books. That affiant has used a number of these books, has given his attorneys sixteen of these books and he and the other plaintiff have eight of them still in their possession. These books were sent to plaintiffs by said defendant Brewery Company for use by plaintiffs in making delivery of Stag and Hyde Park beer and not merely as a form to use in preparing plaintiffs' own books. The defendant Griesedieck Western Brewery Company authorized and directed the plaintiffs to use said books printed in said defendant's name.

Exhibit "H" attached to the affidavit of Reed LeVecke is a form of Order Confirmation authorized and approved by defendant Griesedieck West-

ern Brewery Company. It is a form used by plaintiffs for several years. The plaintiffs used this form because many of the companies purchasing said beer of Griesedieck Western Brewery Company insisted on doing business directly with said Brewery Company and the said Brewery Company authorized plaintiffs to sign their name on said Order of Confirmation. When said purchasers ordered beer, plaintiffs would obtain the number of the freight car and the date of the shipment of the beer from defendant Griesedieck Western Brewery Company and notify the purchaser on said form, Order Confirmation form. That Edward Jones, President of said defendant Griesedieck Western Brewery Company approved the said form and the use and execution of the name of his company by the plaintiffs. The said defendant Brewery Company wanted said purchasers of their beer to know that they were giving the business entailed by said purchases to the Brewery Company and to no one else. When purchases of beer were made for the first time by a new purchaser, the defendant Griesedieck Western Brewery Company would write to the purchasers and thank them for the business that the purchaser had given them. Typical of these letters are the copies of some of them attached hereto as Exhibit "X." Thereafter the said Brewery Company would periodically write letters to such purchaser thanking them for their business during the year.

The letterheads and envelopes of defendant Griesedieck Western Brewery Company were sent to plaintiffs by said company for use by plaintiffs and

with authorization to plaintiffs to sign the said company's name. The said Brewery Company kept the plaintiffs supplied with said stationery and from time to time when their supply got low the said defendant would send more. Plaintiffs used said stationery in writing to the purchasers of said defendant's beer in California. This stationery was exactly the same as that in use by said defendant Brewery Company and was the same stationery that was used in writing to such California companies as Certified Grocers, Shopping Bag, A. J. Byless, United Grocers, Safeway Stores, all of the members of the co-operative grocery associations (being very numerous) and many other purchasers in which said defendant stated that the plaintiffs were their representatives. Typical of said letters are some copies attached hereto as Exhibit "Y."

That the said Henry J. Sewing, Jr., who states in his affidavit that he did not know about the use of said stationery, from time to time sent the said stationery to plaintiffs. In one telephone conversation with affiant the said Henry J. Sewing, Jr., in referring to his company, defendant Griesedieck Western Brewery Company, and authorizing the use of said stationery, said to affiant, "You are us on the Coast."

The telephone listing of the defendant Griesedieck Western Brewery Company in the Los Angeles, California, directories was authorized by Edward D. Jones, President of said defendant company. This listing was carried in this manner because the purchasers of said beers of defendant

company were told that the Griesedieck Western Brewery Company were on the Coast to stay by the President of said defendant (See Exhibit "B" referred to in affidavit of Reed LeVecke) and expected the said defendant to have an office here. That in addition, the President of defendant Brewery Company told affiant that since the name of the said company was on the beer containers, it would be necessary for plaintiffs to have the defendant's name listed in the telephone directory so that prospective purchasers of said beer would be able to contact the Brewery Company.

That in addition to the name of defendant Griesedieck Western Brewery Company being listed in the telephone directory in Los Angeles, California, it was placed on the door of plaintiffs' office with the approval of said affiant, Henry G. Sewing, Jr., and Edward Jones, the President of said Brewery Company. That the said affiant Sewing was in plaintiffs' office and remarked about how the name of the defendant Brewery Company was on said office door.

The defendant Griesedieck Western Brewery Company told all of the purchasers of its beer in California that it was "on the Pacific Coast to stay" and that it was "financially responsible to carry out" its "obligations" to these purchasers. (A typical copy of a letter to a purchaser is attached as Exhibit "Z.") This shows that the said defendant Brewery Company was definitely in business in California.

/s/ WILLIAM LeVECKE

Subscribed and sworn to before me this 4th day of May, 1955.

[Seal] /s/ BELLE KENNICOTT,

Notary Public in and for the County of Los Angeles, State of California

EXHIBIT "X"

Mr. R. C. Holderness Oct. 21, 1952
Secretary, Certified Grocers
2601 South Eastern Ave.
Los Angeles, Calif.

Dear Mr. Holderness:

I thought I would drop you a note and remind you to put me on the CoOperator's Mailing List. I have received occasional copies from our representative, Mr. William LeVecke, and I enjoy them very much and they are very educational.

We appreciate the nice business that your good firm has given us. We also appreciate the publicity plugs you give us occasionally in the CoOperator.

If there is anything I can do at this end of the line for you or for the CoOperator, please command me.

Very truly yours,

Griesedieck Western Brewery Company
Edward D. Jones, President.

EDJ:ak

EXHIBIT "Y"

Listed below are the names of merchants that have purchased stores from Certified members, and attached is the letter that was sent to each:

Morris Wolf, 2700 S. Hooper Ave., Los Angeles 11, Calif.; Ben & Susie Tsuye, 16427 S. Wester, Gardena, Calif.; Harry Sitron, 11001 S. Figueroa, Los Angeles 61, Calif. (Thor Mkt.); Ying Wah Hom, 803 Cypress Ave., Los Angeles 65, Calif. (Cypress Ave. Mkt.); Israel Shanfeld, 4440 E. Slauson Ave., Maywood, Calif. (Maywood Food Center); Sobol & Sobel, 10301 S. San Pedro St., Los Angeles 3, Calif. (Thor's Mkt.); John Or Mary Vieszt, 301 W. Park, Ontario, Calif. (J & M Market); Harold & Julius Drapkin, 2153 Riverside Drive, Los Angeles 39, Calif.; Fred I. Roman, 5153 W. Pico Blvd., Los Angeles 35, Calif. (Meadow Mkt.); Trojan Food Mkts., Inc., 1801 No. Vermont Ave., Los Angeles 27, Calif.; Brookstein & Radin, 8115 S. Avalon Blvd., Los Angeles 3, Calif.; Joseph M. & Eleanor M. de La Van, P.O. Box 100, Crest Park, Calif.

Mr. Morris Wolf
2700 S. Hooper Avenue
Los Angeles 11, California.

November 18, 1953

Dear Sir:

We recently learned through the Co-Operator that you are one of the new members of the Certified Grocers Association.

We are one of the suppliers for the Certified Chain, and we enjoy exceptionally fine business from the Certified Group. Our products are Stag Beer and Hyde Park "75" Beer.

Our representative is Mr. William LeVecke, 1807 East Olympic Blvd., Los Angeles, California,

phone: Vandyke 7944. If you are not handling our products, a telephone call to Mr. LeVecke will be an easy way to get acquainted with our profitable line for distribution in your neighborhood.

At any time that you are in St. Louis, I would be happy to have you call on us and inspect our facilities.

Very truly yours,

Griesedieck Western Brewery Company
Edward D. Jones,
Chairman of the Board

EDJ:bs

Mr. H. L. Sorensen May 6, 1954
United Grocers, Ltd., 685 Sixth St., San Francisco

Dear Mr. Sorensen:

Our representative, Mr. Reed J. LeVecke, very kindly sent me a book of the "Ducks Unlimited" tickets, and I am most happy to participate in this activity. Enclosed find our check for $10.00 in payment of one of the books.

I sincerely hope that this letter finds you in good health and in usual good spirits.

You may be sure that Mr. LeVecke and myself appreciate the fine business that you have given us.

Sincerely yours,

Griesedieck Western Brewery Company
Edward D. Jones, Chairman of the Board

EDJ:bs—cc: Reed LeVecke (Copy)

EXHIBIT "Z"

Mr. Henry Reidt, Manager Oct. 21, 1952
United Grocers
685 Sixth Street, San Francisco, Calif.

Dear Mr. Reidt:

It was a pleasure to meet you and Mr. Sorensen a few days ago, and we are most happy with our association with your good firm.

I should like to emphasize that we are on the Pacific Coast to stay, and as revealed in our financial statement that I gave to your Mr. Sorensen, you will believe me when I say that we are financially responsible to carry out our obligations to you and your dealers.

If you have any ideas as to how we may make our association more profitable, and if you can suggest how it will function more smoothly, please command me.

With warmest regards,

Very truly yours,

Griesedieck Western Brewery Company

Edward D. Jones,
President

EDJ:ak

Acknowledgment of Service attached.

[Endorsed]: Filed May 5, 1955.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: May 6, 1955. At: Los Angeles, Calif.

Present: Hon. Leon R. Yankwich, District Judge; Deputy Clerk: John A. Childress; Reporter: none; Counsel for Plaintiff, no appearance; Counsel for Defendant, no appearance.

Proceedings: It Is Ordered that the motion of defendant Griesedieck Western Brewery Co., filed April 4, 1955, and the motion of defendant Carling Brewing Co., filed April 11, 1955, heretofore argued and submitted are decided as follows: the motion of each defendant to dismiss the complaint is denied, and the motion of each defendant to quash service of summons and complaint is granted.

EDMUND L. SMITH,
Clerk [160]

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: May 12, 1955. At: Los Angeles, Calif.

Present: Hon. Leon R. Yankwich, District Judge; Deputy Clerk: John A. Childress; Reporter: none; Counsel for Plaintiffs: no appearance: Counsel for Defendants: no appearance.

Proceedings: It is ordered that petition for rehearing, heretofore lodged, be, and it is filed, and is denied on the following grounds:

(1) The Federal Rules of Civil Procedure do not

provide for a petition to rehear a motion to quash, and

(2) On the merits, the petition is not well taken. The Court in determining the motion to quash considered the question of solicitation as raised by the affidavits, including the reply affidavit filed by plaintiff after the hearing, by leave of Court, and the additional memorandum filed by the plaintiff, without leave of Court. The memorandum called the Court's attention to the latest decisions of the California Courts on the subject of "solicitation as doing business."

(3) The request to set the matter for further hearing is also denied.

EDMUND L. SMITH,
Clerk. [161]

[Title of District Court and Cause.]

PETITION FOR REHEARING ON MOTION TO QUASH SERVICE OF SUMMONS AND COMPLAINT

To the United States District Court, Southern District of California, Central Division:

Come now the plaintiffs in the above entitled action and petition the above entitled court, Honorable Leon R. Yankwich, Judge, to grant a rehearing on the motion to quash service of summons and complaint in the above entitled action, which

motion was heretofore granted on the 6th day of May, 1955.

Said petition is based on the ground that the defendants were soliciting business in the State of California and that in the State of California the latest cases hold that the "mere solicitation of business" constitutes "doing business" in this State.

That plaintiffs pray that the court set a date for oral [162] argument so that petitioners can present all of their cases to show that defendants were doing business in the State of California and are amenable to process issued out of the courts of this State.

Dated this 11th day of May, 1955.

WILLIAM LeVECKE,
Petitioner.

THOMAS A. WOOD
LARWILL AND WOLFE
By /s/ CHARLES W. WOLFE
Attorneys for Petitioner. [163]

Duly Verified. [164]

[Endorsed]: Filed May 12, 1955.

In the United States District Court, Southern District of California, Central Division

No. 18034 Y

WILLIAM LeVECKE and REED LeVECKE, doing business as The LeVecke Company,
Plaintiffs,

vs.

GRIESEDIECK WESTERN BREWERY CO., a corporation, and CARLING BREWING CO., a corporation, Defendants.

ORDER GRANTING THE MOTION OF THE DEFENDANT THE GRIESEDIECK COMPANY AND THE DEFENDANT CARLING BREWING COMPANY INCORPORATED TO SET ASIDE, VACATE, AND QUASH SERVICE OF SUMMONS AND COMPLAINT

The defendants having appeared herein specially and for the purpose of making a motion to set aside, vacate, and quash service of summons and complaint upon the ground that this Court lacked jurisdiction over the person of said defendants and each of them and upon the further ground that the service of process was and is insufficient and the defendants without in any manner intending to submit themselves to the jurisdiction of the Court as parties to the above entitled cause having served and filed their notice of motion and motion to set

aside, vacate, and quash service of summons and complaint and notice of motion and motion to dismiss and their affidavits and memorandum of points and authorities in support thereof, and the [165] plaintiffs having filed their responsive affidavits and memorandum of points and authorities, and the motion regularly having come on for hearing before the Honorable Leon R. Yankwich, Judge of the above named Court, in the Federal Building, at Los Angeles, on May 2, 1955, and the plaintiffs having then appeared by Messrs. Larwill & Wolfe, and Charles W. Wolfe, Esquire, and Thomas A. Wood, Esquire, and the defendant The Griesedieck Company having then appeared by Messrs. Sheppard, Mullin, Richter & Balthis, and Cameron W. Cecil, Esquire, its attorneys, and the defendant Carling Brewing Company Incorporated having then appeared by John Ladd Dean, Esquire, and Messrs. Sheppard, Mullin, Richter & Balthis, and Cameron W. Cecil, Esquire, its attorneys, and the Court having found from the affidavits and the papers on file in the cause that each of said defendants is and at all times mentioned in the complaint was a foreign corporation; that the service of summons and complaint in this cause was sought to be effected upon The Griesedieck Company by serving the Secretary of State of the State of California and the service of summons and complaint in this case was sought to be effected upon Carling Brewing Company Incorporated by serving K. W. Burrie, the west coast regional representative of the Carling Brewing Company Incor-

porated; that the defendant The Griesedieck Company was at no time doing business within the State of California and that any shipments of beer made by The Griesedieck Company to California were made in interstate commerce, and that on November 1, 1954, said defendant The Griesedieck Company sold and transferred to the Carling Brewing Company Incorporated all of its brewing assets, equipment, real estate, plants, and inventory and that said defendant The Griesedieck Company has not engaged in the brewing business at any time thereafter; that the defendant The Griesedieck Company was not doing any business in California at the time the complaint was filed or at the time the summons was issued or at [166] the time of the attempted service of summons or at the time of the hearing of said defendant The Griesedieck Company's motion to set aside, vacate, and quash service of summons and complaint; that the defendant Carling Brewing Company Incorporated was at no time doing business within the State of California and that any shipments of beer made by Carling Brewing Company Incorporated to California were made in interstate commerce; and that the cause of action sued upon by the plaintiffs against the defendant Carling Brewing Company Incorporated did not bear and does not now bear any relationship to any transactions of said defendant Carling Brewing Company Incorporated in California; and the Court having granted the defendants' motions to set aside, vacate, and quash service of summons and complaint for lack of jurisdiction over the per-

sons of each of said defendants and for insufficiency of service of process;

Now, therefore, it is hereby ordered, adjudged, and decreed that the motion of the defendant The Griesdieck Company and the motion of the defendant Carling Brewing Company Incorporated to dismiss the complaint is denied and the motion of the defendant The Griesedieck Company and the motion of the defendant Carling Brewing Company Incorporated to set aside, vacate, and quash service of summons and complaint are and each of said motions is hereby granted because of lack of jurisdiction of the Court over the person of each of said defendants and because of insufficiency of service of process upon each of said defendants. Costs taxed in favor of defendants in amount of $37.50 pursuant order filed May 23, 1955.

Dated at Los Angeles, California, May 12, 1955.

/s/ LEON R. YANKWICH,
Judge. [167]

Acknowledgment of Service attached. [168]

[Endorsed]: Filed May 12, 1955. Docketed and entered May 13, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the above entitled Court:

Notice is hereby given that William R. LeVecke and Reed LeVecke, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order Granting the Motion to Quash Service of Summons and Complaint entered in this action on the 13th day of May, 1955.

Dated: May 19, 1955.

THOMAS A. WOOD
LARWILL AND WOLFE
/s/ By CHARLES W. WOLFE,
Attorneys for Appellants
William R. LeVecke and
Reed LeVecke. [169]

Acknowledgment of Service attached. [170]

[Endorsed]: Filed May 25, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF THE CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 181, inclusive, contain the original

Petition for Removal;

Copy of all Processes, Pleadings & Orders Served upon the Griesedieck Co.;

Notice of Motion & Motion to Set Aside, Vacate, and Quash Service of Summons & Complaint & Notice of Motion & Motion to Dismiss; (by Griesedieck)

Notice of Motion & Motion to set Aside, Vacate, and Quash Service of Summons and Complaint and Notice of Motion and Motion to Dismiss (by Carling)

Memorandum of Points and Authorities in Support of Motion;

Affidavit of William R. LeVecke in Opposition to Motion;

Affidavit of Reed LeVecke in Opposition to Motion;

Affidavit of L. D. Ballew in Support of Motion;

Affidavit of Arnold E. Wachter;

Affidavit of Edward D. Jones;

Affidavit of Melvin B. Feig;

Affidavit of Hans J. Saemann;

Affidavit of Henry G. Sewing, Jr.;

Petition for Rehearing on Motion to Quash;

Order Granting the Motion of defendants to Set Aside, etc.;

Notice of Appeal;

Designation of Record on Appeal;

Supplemental Designation of Record on Appeal;

Designation by Defts of Additional Portions of Record;

which, together with a full true copy of the Minutes of the Court had on May 6, 1955 and May 12, 1955; and exhibits; all in said cause,

constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.00, which sum has been paid by appellant.

Witness my hand and the seal of said District Court, this 12th day of July, 1955.

[Seal] JOHN A. CHILDRESS,
Clerk.

/s/ By CHARLES E. JONES,
Deputy.

In the United States District Court, Southern District of California, Central Division

No. 18,034-Y—Civil

WILLIAM LeVECKE and REED LeVECKE, doing business as THE LeVECKE COMPANY,
Plaintiffs,

vs.

GRIESEDIECK WESTERN BREWERY CO., a corporation, and CARLING BREWING CO., a corporation,
Defendants.

TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, Monday, May 2, 1955

Honorable Leon R. Yankwich, Judge presiding.

Appearances: For the Plaintiffs: Thomas A. Wood, Esq., and Larwill & Wolfe, by Charles W. Wolfe, 1017 Citizens National Bank Bldg., Los Angeles 13, California. For the Defendants: John Ladd Dean, Esq., and Sheppard, Mullin, Richter & Balthis, by Cameron W. Cecil, Esq., 458 South Spring St., Los Angeles 13, California.

Los Angeles, Calif., Monday, May 2, 1955. 10 a.m.

(Other cases called.)

The Court: I will hear this other matter, then.

The Clerk: 18,034-Y, LeVecke vs. Griesedieck Western Brewery Co., et al.

Mr. Cecil: If the Court please, preliminarily let me state and make a request of the court:

Mr. John Ladd Dean is here from Cleveland. He is a member of the Supreme Court of Ohio, and also I understand admitted to the Supreme Court of the United States. I would like to move his admission for this case only.

The Court: We will extend to him the usual courtesy of admitting him for the particular case.

Mr. Dean: Thank you, your Honor.

Mr. Cecil: Thank you, your Honor. I will present the motion then on behalf of the Griesedieck Company, your Honor, and Mr. Dean will present it on behalf of the Carling Company.

This case falls I think, if the court please, so far as the Griesedieck Company is concerned, squarely within the Martin Bros. Electric Company case, appearing in 121 Cal. App. (2d) 790.

This is a case in which the LeVeckes acted as distributors, and only as distributors for the Griesedieck Western Brewery Company.

There are voluminous affidavits and voluminous exhibits in here, but when all of the affidavits and all of the exhibits are stripped to their essentials, it is quite apparent that there is nothing here, so far as the Griesedieck Company is concerned, other than a distributorship.

We submit, if the court please, that under both the Martin Bros. Electric Company case and all of the other California cases which are concerned with service of process, a motion to quash has always been granted where there is no basis of service other than that the company "is doing business," where its only connection with the State has been

that it was distributing its products which were shipped into the State in interstate commerce, and distributed through an independent distributorship.

We submit, if the court please, that while Exhibit J of the affidavits of the LeVeckes show and purport to show a business card which has the name William R. LeVecke, and at the bottom of it on the left hand side the "Griesedieck Western Brewery Co.," that that card is not completely accurate; that that card was not sent out by the Griesedieck Company; that the card with only the "Hyde Park '75' " trademark at the top left hand side was sent out, and the cards were sent in blank; that the use of the Griesedieck name on it was neither known, authorized, nor permitted by the Griesedieck Company, and that there was no representation that Mr. LeVecke was the Griesedieck Company in California, so far as has been known to that company.

There is also considerable discussion of these books which showed, "Griesedieck Western Brewery Co.," and which it is claimed by the LeVeckes were required to be used by them for the Griesedieck Company in California.

We submit that the books, on the face of the books themselves, show that that could not be so. There is on the third line of that not a place for the California liquor license number, but the Missouri liquor license number. These books were sent out merely for the purpose of being used as a form, which the distributor here could use if he wanted to use it, and not to use if he did not want to use it.

There is also some contention made that the east-

ern company determined the prices. We submit that under Exhibit K of the LeVecke exhibits themselves, this is shown not to be so.

Mr. Jones of the Drexel Company, which was a company which was buying Griesedieck beer out here from the LeVeckes, sent a telegram, in which he said:

"We have been selling Stag in Fresno at 15 cents, 6/90 cents. Do you want us to raise to 17 cents, 6/99 cents?"

In other words, even by the affidavit of the LeVeckes themselves, the distributors were not looking to the Griesedieck Company to fix prices. They were looking to the LeVeckes, the distributor here on the coast, to fix the prices, which was done.

In addition, if the court please, one further thing: The rest of the exhibits, or, as a matter of fact, most of the rest of the exhibits and affidavits filed by the LeVeckes are based upon the contention that Mr. Jones of the Griesedieck Company came to California and solicited business in California, did a continuous solicitation, and there is an inference left that maybe he was one of many employees. As a matter of fact, he was the only one, with the exception of one man who came with him at one time.

The Court: I presume that the solicitation of business point goes back to the West Publishing Company case.

Mr. Cecil: Well, I don't know what the plaintiff-respondents' contentions are in that regard, your Honor. It is our contention that there is no solici-

tation here at all by the Griesedieck Company, that Mr. Jones——

The Court: I have had many of these cases, and I have found that on the whole each case presents facts that are unique, and that a lot of the general language contained in various opinions must be applied cautiously. Of course, that depends also on the nature of the action.

One of the most recent cases which went to the Ninth Circuit was a case in which damages were sought to be recovered because of an inherent defect in a wood-turning machine. I tried the case without a jury and rendered a judgment against the parent company, and the case was sent back with the direction to take additional testimony on the problem of agency.

I had held that because the catalogs of the parent company represented the California concern as the agent that they could be sued, and ultimately the case was affirmed on both grounds.

Here the question does not relate to the sale of any product,—I mean the sale of any machinery. It is not a tort. It is merely a straight breach of contract case, and, therefore, the question before the court is whether the showing is sufficient from which to draw an inference that they were doing business here through him, and, of course, the relationship, the manner of solicitation, if any, and the manner of clearance becomes important.

In other words, I am pointing to the fact that ultimately we have to decide this according to California law, as to whether the company is doing

business here. This is a diversity case, and, therefore, as the Supreme Court has said, we merely sit as another Superior Court of the State, and we have to apply the particular rules which they have applied.

I will hear from the other side, and see upon what line of cases they rely. Or do you want the other counsel to present his position, too, and then you argue them both at the same time?

Mr. Wolfe: That probably would be better in this case, your Honor.

The Court: All right. We would probably gain time.

Mr. Cecil: Your Honor please, before you go to the Carling matter, I have an affidavit,——

The Court: An additional affidavit?

Mr. Cecil: An additional affidavit. I recognize that this does not comply with the Court's rules, because it was not served two days before the hearing. It was delivered to counsel this morning. The reason for that was that it was not delivered from the East to my office until this morning.

The Court: On a matter of this character, I will waive the technicality, of course, with the understanding that if counsel at the conclusion of the argument desires to have time to file a counter-affidavit, he may do so.

Mr. Cecil: I understand that, your Honor, and I apologize for its being here this late, but it was a matter which I could not help.

The Court: All right. It may be filed, and if

counsel feels he wants time to study it more carefully, and to reply to it, he may do that.

Mr. Cecil: May the record show that a copy has already been served?

The Court: All right.

Mr. Dean: If your Honor please, I very much appreciate the courtesy of being able to appear in your court, but just to correct the record, Mr. Cecil identified me and qualified me as having been admitted in the United States Supreme Court, as well as in the Ohio courts. While I have been admitted and have practiced in a number of the Federal and Circuit courts, I have not as yet been admitted to the Supreme Court.

The Court: That is all right. We extend the courtesy to practitioners of other states who appear here.

Mr. Dean: I very much appreciate that, your Honor.

The Court: Of course, I have come in close contact with some of the other judges, particularly Judge Kloeb of Cleveland.

Mr. Dean: Oh, yes.

The Court: Judge Kloeb and I are on an anti-trust committee, and we meet and get together about every two years.

Mr. Dean: Yes.

The Court: I will hear from you, sir.

Mr. Dean: Now, your Honor, I just want to speak very briefly with respect to the situation which obtains with regard to the second defendant, the Carling Brewing Company, which is quite dif-

ferent, I believe, from that of the other defendant, The Griesedieck Company, formerly the Griesedieck Western Brewery Co.

The Carling Brewing Company is a corporation of Virginia, and this is a diversity case, which accounts for the removal.

As your Honor has pointed out, we have submitted these affidavits, which I know full well you do not care to have me review in detail, because I know you have read them, or will, and we submit that, as evidenced by those affidavits, the defendant, Carling Brewing Company, has been engaged solely in interstate business.

One point really that I wanted to emphasize briefly, and I too have read these affidavits which have been filed pertaining to the Griesedieck motion, and recognize the conflicts on each of the points, but, if your Honor please, we submit on behalf of Carling that none of these things have any bearing upon the cause of action that is asserted here, nor has any of the activity of the Carling Brewing Company in the State of California any bearing upon it.

The situation is this: As your Honor has observed from reading these papers, as of November 1st of last year the Carling Brewing Company acquired the assets of The Griesedieck Company, with which concern the plaintiff had a connection, the details of which and the business activities of which other corporation, The Griesedieck Company, is the subject of their motion.

The contention is made in the petition and on the

present motion brought to the court's attention that during the negotiations a letter was sent to the then dealers of The Griesedieck Company, stating that these negotiations and proceedings were taking place, which indicated a closing that would transfer all of the brewery assets of The Griesedieck Company to the Carling Company, and that the Carling Company had no intention to make any changes in the lines of malt beverage products which The Griesedieck Company made during the time of its operations in St. Louis, Missouri, and in Belleville, Illinois.

There is also attached an exhibit to a second affidavit filed in this case, and signed by Mr. LeVecke, Sr., signed by the president of the Carling Brewing Company, confirming that which the president of The Griesedieck Company had said in a letter to his dealers, that the Carling Company was concluding this arrangement, whereby it would acquire the assets, and that it had no intention of making any changes in the Griesedieck line.

Now, the Carling Company, indicated by a separate affidavit filed by the general sales manager in answer to that particular LeVecke affidavit, had not made any changes in the Stag line, but it has not sold any of those products—I mean by "those products," the products of the Griesedieck Western Company, and it was Stag beer, and it was Hyde Park beer—anywhere in the western states from the time that the actual consummation of the purchase and sale transaction was made, namely, on November 1, 1954.

The Court: Let me ask you this question, sir: Wouldn't the problem there as to them be this, assuming that from the time of the transfer of assets, they discontinued any activity, wouldn't they necessarily be tied to the—what is it?—The Griesedieck Company?

Mr. Dean: The Griesedieck Company, that is correct, sir.

The Court: Wouldn't they be tied if through the acquisition of assets they also assumed the contracts of The Griesedieck Company?

Mr. Dean: Assuming that there was a contract.

The Court: I mean the Griesedieck Company. That is right, assuming that there was a contract.

Mr. Dean: Yes.

The Court: In other words, the discontinuance of the business might put them in a different class if they did not take over the contract. There is such a thing as a person taking over only the physical assets.

Mr. Dean: Yes.

The Court: We had an illustration here in the newspaper world, where the Los Angeles Times bought the good will and the name of an afternoon newspaper, but did not assume any of the obligations or liabilities of the parties, so that they remained a separate entity, and, of course, that is possible in any kind of a transaction.

Mr. Dean: I appreciate what your Honor says, and, of course, it does go to the merits of any possible claim that might be made against the Carling Company as to the essence of the transaction itself,

which I know it would not be orderly for me to make any comments about here, but the point I was trying to make was that so far as the cause which is asserted here against The Griesedieck Company and against the Carling Company, as a secondary defendant, and this is shown by the affidavit of Mr. LeVecke, Sr., which was filed subsequent to their first papers, that prior to November 1st it was made perfectly clear, as they say in their affidavit—and your Honor has read that affidavit, I believe, of William LeVecke, Sr.—that the general sales manager made it perfectly clear to him that there was no relationship and would be no relationship, so far as a business with the plaintiff in this case, by and between the Carling Company and the plaintiff.

Now, those things which the Carling Company did do in California by its regional representation here all related to the product which it has sold for some time here, and which it continues to sell, the Carling Red Cap Ale and Carling Black Label Beer.

Admittedly by the action which has been filed and removed to this court, those products and that activity has no bearing whatsoever upon the present cause of action, which is solely concerned with Stag.

Now, I believe that under those circumstances your law here is—always recognizing, as your Honor has said, that each one of these cases must be examined upon its particular facts—but the general rule is that if the activity which has taken place in the jurisdiction, and in this instance it has been all interstate, but measuring it by these vari-

ous tests that have been reviewed so much in recent years, if that activity does not give rise to the liabilities which are sued for, it is not sufficient to subject that defendant to the jurisdiction of the court; and that is the position that we believe, as is rather clearly evidenced by the affidavits which have been filed here, the Carling Brewing Company is in.

I could elaborate by a review of these affidavits that it has been very strictly an interstate business, and there has been no delivery from warehouses on orders that were confirmed in this State. Well, I covered all of those points rather carefully in the affidavits which we presented to you.

The Court: That is one of the elements I referred to. The West Publishing Company case, involving the very well known publishing company at St. Paul,——

Mr. Dean: Yes, I know the case.

The Court: ——is a leading case. There were earlier cases, going back to the Simmons Saw Company, and others,—in fact, I have a complete list of them——

Mr. Dean: Yes.

The Court: But in the West Publishing Company case the court held that where there was control of activities, solicitation, and the like, and the man had control over the entire state, so his commissions amounted to a great deal of money, and I think he was getting about $40,000 a year at that time, which was a lot of money in those days merely for a book salesman. It made you wonder why you did not go into that business, selling law books,

rather than the practice of law, or especially a judge. Incidentally, I have always considered that was a departure from what the law had been before, and that the court really repudiated the earlier cases, but did it in the way they like to do it, by trying to distinguish them, because under the old cases, like the Simmons Saw case, different criteria were applied than were applied in the West Publishing Company case.

Mr. Dean: I know your Honor is also familiar with the International Shoe Company case, and it was to the rule laid down there that I was giving emphasis, that the activities must also be those which give rise to the liabilities sued upon.

The Court: That is right. I have here a list of all the cases on doing business, including the two decisions by two of our own judges, Judge Hall's decision in Farr Company vs. Gratiot.

Mr. Dean: And Dunn vs. Cedar Rapids Engineering Company?

The Court: Yes. And then there is Judge Carter's decision in Perkins vs. Louisville & Nashville Railroad Company.

Mr. Dean: Yes. Then a case I think is of some real significance so far as the Carling Company as a defendant here is concerned is Perkins vs. Benguet Consolidated Mining Company, a 1952 case.

The Court: The latest California case that I have got marked here is Thew Shovel Company vs. Superior Court, or one of the latest, which is in 35 Cal. App. (2d) 183. The Simmons case is an old case, way back in 2 Cal. App. That is pretty old.

The West Publishing Company case is, of course, a Supreme Court decision and is in 20 Cal. (2d) 720, and it is a more elaborate expression.

Mr. Dean: Then Martin Bros. Electric Co. vs. Superior Court,—did your Honor take note of that case, wherein we have quoted in our memorandum the general tests, which there are well stated, and where the court said:

"Not 'any activity' of a foreign corporation in the state will make it amenable to process and there is no precise test that can be applied in all cases. It 'is the combination of local activities conducted by such foreign corporation—their manner, extent and character—which becomes determinative of the jurisdictional question.'"

The Court: That is right.

Mr. Dean: Now, we may suffer from the fact that there are two defendants here against which the claim is made, and somewhat different jurisdictional points are taken.

While we contend that the very limited activity we have in the state is of such interstate character that we should not be subject to the jurisdiction, we place added emphasis upon this, your Honor, that the relationship of Carling to this whole Complaint of the plaintiff is that of a stranger, and that before there was any acquisition at all the relationship was made completely clear to them, and there was no basis for a grievance on that ground at all, but that whatever activities we had were not such that we should be within the jurisdiction in this particular case.

The Court: All right. I will hear from the other side.

The Clerk: Mr. Charles Wolfe for the plaintiff.

Mr. Wolfe: If the court please, at the outset I might state that the court has already referred to some of the leading California cases on the question of whether or not a foreign corporation is doing business in the State of California, and the case that your Honor cited, the Thew Shovel Company case, is typical of the recent decisions in the State of California on that particular point.

In the Thew Shovel Company case it was stated that the essential thing is merely whether the corporations are present within the state, whether they operate through an independent contractor, agent, employee, or in any other manner, and in the cases that we cited under our points and authorities we pointed out that if the representation which the foreign corporation maintains in the state gives it substantially the same benefits it would enjoy by operating through its own office or paid sales forces, it is doing business in the state, and it is amenable to process. And under that particular point we cited the late cases, including the Jeter vs. Austin Trailer Equipment Company case of 1953, the Iowa Manufacturing Company case of 1952, the Fielding vs. Superior Court case of 1952, and they all state that if a foreign corporation is receiving the same benefits in this state, and through operation in this state, no matter how they operate, whether it is through their own sales force or not, that they are in effect doing business in this state.

Now, Mr. Dean stated in his affidavit, I believe, or in one of his affidavits, that the Carling Company has an office in this State, had an office here at all times, had a sales force I believe of six men and a supervisor, and he states that the business which the office force in this State was doing was interstate business.

However, we have shown, I think, by affidavits that they took over this Griesedieck Company, that they wrote letters out here to the various people who were representing the Griesedieck people in the sale of the beers, the two brands of beer, and, among other things, they stated in this letter to these various individuals that, in the meantime, "Please accept this cordial greeting and my sincere hope"—this is from the president of the company—"that we may work together happily and successfully for many years to come."

This was a letter which followed a letter from The Griesedieck Company. The Griesedieck letter, from the president of the company, told the LeVeckes that the business or the assets were to be taken over by the Carling Company, but to continue to sell the beer because they were going to be incorporated right in the Carling setup.

Then the Carling letter follows immediately, and it starts out:

"I know that Mr. Edward D. Jones has written to tell you of our negotiations now in progress."

In other words, they follow up with another letter stating that Mr. Jones of Griesedieck "has already informed you, and we want to confirm that, we want

you to sell our beer, and to continue to sell it, and we hope we can continue to work happily together for many, many years to come."

The Court: That would not be the assumption of a contract.

Mr. Wolfe: No.

The Court: That would not be the assumption of a contract. In other words, the law would require much more before you could say that in this manner you assumed a contract existing in favor of the person to whom this letter was written, or whether it was oral or written.

Mr. Wolfe: Yes, we would expect to prove that. But they are here merely stating that they were doing business in an interstate manner, that is, interstate business, even though they had their offices here in this State. Now, we also showed how Carling——

The Court: Of course, I think this, the mere business of having an office in the State does not mean very much.

Mr. Wolfe: No.

The Court: It all depends on what they do. After all, they may have an office as just a sort of a clearing house, and if the price is set in the foreign state and if the payments are made through that state, and all that the agent does is to solicit orders, after which he loses control, and payments are made in that way, the mere fact that they may even keep an office for him under the other company name has been held to be not sufficient.

Mr. Wolfe: Yes, that is true, but the fact that

they are obtaining the same benefits through other agents, as heretofore,——

The Court: That dictum I am familiar with. The Supreme Court has never used that test,—the Supreme Court of California. The West Publishing Company case does not use that test, and if that were the sole test, then there would be no such thing. Any corporation that would send a man into the state to pick up any kind of business would be included.

For instance, let's take an illustration which is familiar to all. I became very familiar with it because I had a very important case involving them many years ago. That is Brooks Bros. So let's take Brooks Bros. of New York.

Now, with Brooks Bros. of New York, if you have watched their advertisements in New York, and we will leave out California here, because they have an agency here, and so forth, but take in any other places like Los Angeles. They are a New York corporation, and they give notice—I have read them myself in the New York Times and in the Los Angeles Times—announcing that their representative would be at certain places, like Pasadena, or Monrovia, where people who would like their certain type of clothes could know they would be there.

Now, if that is true, and I am using them because they resort to that type of advertising, and if that principle you mentioned is enough, then Brooks Bros. of New York would be doing business in California, and I do not think there would be any

justification for that assumption, because, as you say, they have benefits, and if you use that criterion, then, of course, if they had a business of their own, they might make more money, and they would get the same benefits. So the mere presence of a salesman in the State would put them here for all purposes, and I don't think that that criterion in itself is sufficient.

Mr. Wolfe: No.

The Court: Because if you apply that, as I say, then any kind of solicitation for business in the State would be called "doing business," and that is not the rule.

Mr. Wolfe: No. If the court please, the cases that I mentioned, the four very late cases, have used this language, and these are the four cases, Jeter vs. Austin Trailer,—and they are all set forth in our points and authorities—the Iowa Manufacturing Company case, the Fielding Company case, and the Sales Affiliates case, and they state in each of those cases that if the representation which a foreign corporation maintains in this State gives it substantially the same benefits it would enjoy by operating through its own office or paid sales force, it is doing business in this State and is amenable to process.

Now, what I wanted to point out to the court was that these two corporations were enjoying the same business and the same benefits by operating through their agents in this State as they would have if they had moved their entire office out to this State.

The Court: But you want to bear this in mind

also, that, just as in the law of partnerships, certain acts may be sufficient as to third parties to charge them as partners which are not sufficient as between themselves, the problem in this type of case is different when you are dealing with a stranger.

If somebody were to sue The Griesedieck Company for something that LeVecke did, claiming that he represented them, which is the usual case, the proposition would be entirely different from one who is a part of the organization himself.

Mr. Wolfe: That is right.

The Court: And so here we have a different proposition. This is not the case of a partnership.

Mr. Wolfe: That is right.

The Court: We hold that persons who hold themselves out as partners may be held responsible for the acts of a partnership, and that is especially true in California, because, as you no doubt know, I am old enough to have practiced before 1929, and, in fact, I have been a judge since before 1929, but you know that since 1929 we have the uniform partnership law, which, of course, extends the scope of partnerships. Before that time, for instance, California never recognized a partnership as an entity. You could not sue Smith and Jones as partners, or be sued by them. You would have to sue them as John Smith and James Jones, doing business, because we did not recognize a partnership as an entity. That was changed by the law of 1929, so that as of now the partnership will be held responsible.

Recently I wrote an opinion which ought to be out in about a week in the Federal Supplements

upon a very important problem, whether a deed made by two members of a partnership, there being no others, was binding on the partnership, even though it did not say, as required by a section enacted after the partnership law was enacted, in 1931, which said that any conveyance by a corporation or by a partnership shall state it was done on behalf of the corporation or partnership, and by the particular individual,—I held in that case that so far as the bank was concerned, which loaned them $54,000, there being only two persons in the corporation, that if that conveyance was good before, it was certainly good now, because the Legislature did not intend to restrict the rights of partners but rather extended them by the law.

So you see all those cases which you mention are cases where somebody, who did business with the corporation, sued the corporation there, and the courts were called upon to determine whether the acts and representations of the company were such that they had a right to assume that they were acting through this agency, and even then, the finding must be sufficient.

Let me interrupt for a moment, Mr. Wolfe, to call attention to a case I refer to. This is Woodworkers Tool Works vs. Byrne, 191 F. 2d 667. That was a case in which a person who was injured by an inherent defect in a woodworking machine brought suit. I heard the case without a jury, and gave judgment against the foreign corporation and their local agent.

The Court of Appeals sent the case back to me,

with directions to take additional testimony. They held that the evidence was not sufficient, and they sent it back to me to retry upon that issue only. Of course, we got into the usual trouble, that the lawyers said it was sent back for all purposes, but I insisted that when they said that the judgment was vacated for the purpose of taking additional testimony, I would not go back and go into the question of liability, and the Court of Appeals on the second appeal said I was right once more. That case is Woodworkers Tool Works vs. Byrne, 202 F. 2d 530.

I will read to you the findings which the court said were sufficient to show how, when you are dealing with a third person, who claims the right to bring—let's use the expression "to bring the foreign corporation in through the acts of the agent," you are in a different position than when the agent himself sues the foreign corporation and says, "You were doing business here through me." You are in an entirely different situation, and this is the finding which I finally made on the second trial:

"That Elmer Preuer is the sole proprietor of Woodworkers Supply Company";——

Now, that was the California concern. The eastern concern was Woodworkers Tool Works—"that defendant, Woodworkers Tool Works, a corporation, was engaged in selling its products in California through the agency of said Woodworkers Supply Company; that the panel raiser head involved in this action was sold to plaintiff's employer, Selby Company, in California, by defendant through said Woodworkers Supply Company; that

defendant had a running course of business every year and sold some of its items at all times in California through said Woodworkers Supply Company on a commission basis; that defendant's business of selling its products in California through the agency of said Woodworkers Supply Company was continuous and systematic";—that takes care of those cases where it is sporadic—"that said panel raiser head as well as other products of defendant sold in California were shipped by defendant company directly to the purchasers through orders received from Woodworkers Supply Company and paid for by purchasers through said Woodworkers Supply Company";—in other words, that while they were shipped from the East, the payment was through the local agent—"that said Woodworkers Supply Company was the agent of defendant, Woodworkers Tool Works, as their identity of names implies."

Now, the opinion written by Judge Healy said:

"* * * * But the motion of appellant to quash the service of summons had been denied by the trial court, and we thought, 191 F. 2d at pages 670-673, that the showing before the court at the time the motion was ruled on, going to the issue whether appellant had constituted one Preuer by law an agent in California to receive service of process on its behalf, was insufficient to warrant the denial. We noted, however, that during the course of the trial substantial oral evidence had been received tending to show the existence of the necessary agency relationship between appellant and Preuer, and we summarize this evidence, 191 F. 2d at page

673; but it was further noted that the trial judge regarded the jurisdictional problem as having already been determined, hence had not taken the oral evidence into account except for such bearing as it might have on the merits.

"We were of opinion that the issue of the validity of the service, inasmuch as it was one of due process, was open to further examination and that the evidence adduced on the trial might properly be considered as supplementing the original showing on that issue. We said, 191 F.2d at page 673,"—and then they quote it. Then after that they say:

"After consideration and disposition of the remaining issues the court made the following order": and then they repeat what they had said, and then they said that they remanded it only for that purpose. Then they held that my specific findings on the second trial were adequate.

This is, I think, one of the latest decisions of the Court of Appeals showing the way in which they apply the California cases. You will find in this opinion they cite all the Supreme Court cases relating to the relationship of a corporation to its subsidiary, and so forth, down to the International Shoe Company vs. State of Washington case, and they reached the conclusion that the evidence was insufficient to permit the court below to find that the Woodworkers had constituted the Woodworkers Supply Company their agent for process. Then, of course, when they came back I asked them if they wanted to produce additional testimony, and

they said, "No," so on the basis of that I made the finding.

So you can see how our Court of Appeals applied it. They held that the showing made by the affidavit, that they sold through them and consigned to them on a commission basis, and so forth, was not sufficient, but they held there were other facts. But they said I did not make any findings, so when it came back, I made the additional findings.

So here is one of the latest cases showing the combination of both the State and Federal law as the Ninth Circuit interprets it.

Mr. Wolfe: Yes, your Honor. We cited that in our points and authorities, Woodworkers vs. Byrne, and, I believe, as I recall, it is also cited in those late cases, the California cases.

The Court: That is right. But I don't know of any cases in the briefs that involve a question where the agent himself sues and tries to bring in his principal into the State. These are all cases where third parties do that.

Of course, the point I am trying to make is that, just as in partnerships, certain acts may not bind the parties as against themselves, but may be sufficient against third parties who acted on the assumption of the partnership. So on this branch of the law we have to approach it from an entirely different angle when we consider the problem of a third party, who does business through the agent as against when the agent himself tries to bring the principal into the State.

Mr. Wolfe: Yes, your Honor. With that in

mind, we made our affidavits, I think, to show how the LeVeckes here in this State had the authority to settle certain matters for The Griesedieck Company, how their stationery was sent out by The Griesedieck Company, so that the LeVeckes could use the stationery as the representative of The Griesedieck Company to settle these claims with third parties, how the third persons, for instance, the Drexels, would look to LeVecke to find out at what prices they should sell the beer, and, of course, the LeVeckes would check with the home office that The Griesedieck Company had, and all of those things came into play.

In other words, The Griesedieck Company not only had dealings directly with the LeVecke Company, but the LeVecke Company also was representing The Griesedieck Company in certain matters here in California, and we, I think, set forth in our affidavits and showed how The Griesedieck Company would send out correspondence to the LeVeckes and say, "You answer it," or when problems arose here with other people in this State with whom The Griesedieck Company was doing business directly, such as Drexel, Drexel would call the LeVeckes and say, "What are we to do with this?" Or ask the LeVeckes how to settle a certain matter, and they would, in turn, confer with The Griesedieck Company.

So you have, in addition, not just the dealings between The Griesedieck Western Brewing Company and the LeVeckes, but you have the LeVeckes acting on behalf of Griesedieck, and between many

other people here in the State of California, answering correspondence between them and The Griesedieck Company, and all of those things were taken into consideration, and they were put into the affidavits.

Now, there is no denial, as far as The Griesedieck Company is concerned, that they were out here, they tried to sell their beer here, the president of the company came out and made tours of California, periodic tours, selling tours, and he also came out here and he presented to the various people out here copies of their financial statements, and he said, "We want you to know"—in one of the letters which are attached to our affidavits, he said, "We want you to know that The Griesedieck Company are here to stay, we are not just a fly-by-night outfit, we are here on the West Coast to stay, and I am presenting you with our financial statement to show that we can live up to our obligations, and we say we are going to sell you beer here in this State, and on the coast here, and I want you to look over our financial statement, which will show we are substantial and financially responsible persons."

He made these trips out here, and made the trips out here for that specific purpose and that specific reason. So, in addition to just the fact that The Griesedieck Company was dealing with the LeVeckes here on the coast to have them sell certain of their beers, they also had the LeVeckes do many other acts as direct agents. They had the card of The Griesedieck Company.

Now, counsel point out to the court that they just

sent the cards out here without the printing on them, other than the names of the two beers, and they sent them out in blank to the LeVeckes, and that the LeVeckes took it upon themselves to print in their names as representatives of Griesedieck Western. But I might point out to the court that this practice went on for many years, for a period of four or five years, and, also, the fact that there were never any complaints theretofore made, and The Griesedieck Company said, "We have no correspondence showing that we authorized them to act as our agents," but, nevertheless, they must have authorized that, or that course of conduct would not have gone on for so many years.

They also sent out their stationery. Now, they can't deny that, and they don't deny it. In fact, I don't think they have answered the reason why they sent out their stationery. The stationery was sent out here so that the LeVeckes could use it and sign it as their agents.

So we have here all together different, and many different reasons. It is an accumulation of many different representations by the LeVeckes, and not just on the part of the LeVeckes selling beer for the company, but representing them in many other capacities, even settling the price of beer for and on behalf of The Griesedieck Company.

The Court: All right.

Mr. Wolfe: Now, we have already made our statement concerning Carling. I think our affidavits are ample, and I think I might state to the court that we have a great deal of correspondence between

the companies, and we made our affidavits so voluminous that we thought it unnecessary to bring in and file that with our affidavits.

The Court: All right. Have you seen this additional affidavit, and do you want time to answer that one, or do you want to stand upon the record?

Mr. Wolfe: Well, we would like to answer it for this reason, that the facts as stated there are not true. They state that only one or two books were sent out here, and we have a whole cabinet of these delivery books that were sent, and they were not merely sent here for the form to be followed by the LeVeckes, but they were sent here for the purpose of use, so we would like to answer that.

The Court: I think there is some merit to that. For instance, in Paragraph V they allege directory listing. That is a strong element, and I would rather have your view on that in the record before I rule on the matter.

Mr. Wolfe: All right. We would like to answer that.

The Court: Do you desire to add anything?

Mr. Cecil: I don't believe so, your Honor.

The Court: Then how much time do you want to answer that,—five days?

Mr. Wolfe: Five days will be satisfactory, your Honor.

The Court: All right. The plaintiffs are allowed five days in which to answer the affidavit filed this morning, the affidavit of Henry G. Sewing, Jr., and the matter to stand submitted at that time.

All right, gentlemen, thank you.

[Endorsed]: No. 14816. United States Court of Appeals for the Ninth Circuit. William R. LeVecke and Reed LeVecke, Appellants, vs. Griesedieck Western Brewery Co., a corporation, and Carling Brewing Co., a corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: July 13, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14816

WILLIAM LeVECKE and REED LeVECKE, doing business as The LeVecke Company,
Appellants,

vs.

GRIESEDIECK WESTERN BREWERY CO., a corporation, and CARLING BREWING CO., a corporation, Respondents.

APPELLANTS' STATEMENT OF POINTS

Appellants intend to rely on the following points in this appeal:

1. That respondents Griesedieck Western Brewery Co., a foreign corporation, and Carling Brewing

Co., a foreign corporation, neither of whom had qualified to do business in the State of California as provided by law, were, at the time of the accrual of appellants' causes of action against them, and had been, doing business in the State of California so as to make them amenable to service of process, in an action commenced against them in a Court of the State of California, through service of process on the Secretary of State of California.

2. That appellants have a cause or causes of action against respondents.

3. That the United States District Court erred in making its order granting the motion of respondents to quash the service on them of summons and complaint.

Dated this 5th day of August, 1955.

THOMAS A. WOOD,
LARWILL & WOLFE,
/s/ By CHARLES W. WOLFE

Affidavit of Service by Mail attached.

[Endorsed]: Filed Aug. 8, 1955. Paul P. O'Brien, Clerk.

No. 14816

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM LEVECKE and REED LEVECKE, doing business as THE LEVECKE COMPANY,

Appellants,

vs.

GRIESEDIECK WESTERN BREWERY CO., a corporation, and CARLING BREWING CO., a corporation,

Appellees.

APPELLANTS' OPENING BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

No. 14816

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GRIESEDIECK WESTERN BREWERY CO., a corporation, and CARLING BREWING CO., a corporation,

Appellees.

APPELLANTS' OPENING BRIEF.

Statement of the Pleadings and Facts.

On February 24, 1955, appellants filed an action against the appellees in the Superior Court of the State of California, in and for the County of Los Angeles, for damages for breach of contract and fraud [Tr. pp. 11 *et seq.*]. An order was entered in said court for service of Summons and Complaint in said action upon the defendant, Griesedieck Western Brewery Co., by serving the Secretary of State of California [Tr. pp. 22-23].

Service of the said summons and complaint in said action was duly made upon said appellee Griesedieck Western Brewery Co. by serving the said Secretary of State of California [Tr. pp. 47-48], and was made upon

the other appellee, Carling Brewing Co., by serving its agent in California [Tr. pp. 49-50].

About March 29, 1955, each appellee filed a petition for removal of said action from the Superior Court of the State of California, Los Angeles County, to the United States District Court, Southern District of California, Central Division. At the same time they filed their undertakings on removal of said cause [Tr. pp. 3 *et seq.*].

Thereafter, on or about April 10, 1955, said appellees filed a notice of motion, and motion, to set aside, vacate and quash the service of summons and complaint; also a notice of motion, and motion, to dismiss [Tr. pp. 23-25 and 49-51]. Said motions duly came on to be heard. Thereafter, the Court made its order, granting the motion to quash service of summons and complaint on each of said appellees and denying their motion to dismiss [Tr. pp. 147-150]. The order granting said motion was docketed and entered on May 13, 1955 [Tr. p. 150].

On May 19, 1955, appellants filed their Notice of Appeal from said Order granting the motion to quash service of summons and complaint on the appellees [Tr. p. 151].

Facts.

In California, the appellee Griesedieck Western Brewery Co. (sometimes herein referred to merely as "Griesedieck") is a foreign corporation, being incorporated and existing under and by virtue of the laws of Illinois [Tr. p. 26]. Appellee Carling Brewing Co. likewise, is a foreign corporation, being incorporated and existing under the laws of Virginia [Tr. p. 51]. Appellants have alleged in their complaint that said appellees, and each of

them, breached its contract with appellants, and as a result thereof and in violation of said contract, the appellants were deprived of their rights to make sales of certain beer products manufactured by appellees. It is further alleged that as a result of said breaches of contract, appellants have suffered substantial damages [Tr. pp. 11-21].

Appellee, Griesedieck Western Brewery Co.

The appellee Griesedieck Western Brewery Co. with plants at Belleville, Illinois, and St. Louis, Missouri, was doing business in the State of California from 1950 to 1954. During said period of time the officers of said appellee made frequent visits to California, to supervise the heavy sales in said state of said appellee's beer products [Tr. p. 63]. Appellants were openly, freely and frequently acknowledged as the agents and distributors in California for Griesedieck and for promoting and selling appellee's said beer products during the period of years mentioned [Tr. pp. 75-96]. Likewise, during said years, said appellee's president made trips to California. He visited many of the supermarkets in that state, for the purpose of increasing the sales of appellee's beer products. He called on the various wholesale grocer organizations, and many retail stores in California [Tr. pp. 75-92]. In his visits to these stores, appellee's president thanked the various stores for the business they had given to his company [Tr. pp. 79, 81-85] and told them he was interested in increasing the sales of said appellee's beer products. He also told executives of these various stores that they were assured of continued sales of his company's beer because Griesedieck was on the Pacific Coast to stay; they intended to continue business in this area

[Tr. pp. 85-88]. During these sales promotion trips to California, one of the appellants usually accompanied appellee's president when he went on side trips within the state, to stimulate sales. In order to assure the purchasers of said appellee's beer products that the said appellee company was on the Pacific Coast to stay, the president gave to the various stores and prospective purchasers copies of the said appellee's financial statement, to show that said appellee was able to meet its obligations and could carry out all of its sales agreements and responsibilities [Tr. p. 87]. The said executive thanked the various stores for the business given Griesedieck [Tr. p. 84] and assured them that the appellee was personally making sales of its products in California and would be personally responsible to the stores in said state [Tr. pp. 87 and 143].

Further Griesedieck's president, on behalf of said appellee, donated prizes for contests by the various California stores involving the sale of appellee's beer products [Tr. p. 69]. He also talked to the employees of the various stores and expressed appreciation to them for their support in the sales of appellee's products. He attended a party given by the employees of one of the large chain stores and told the employees that he would attend their party every year [Tr. p. 69].

As part of the supervision and sales effort in California on the part of appellee Griesedieck, the said company inspected the merchandise program and plan of appellants, for the sale of appellee's beer products. Appellee sent out advertising matter to appellants, directed appellants on how to carry out their sales programs to increase the sale of appellee's products [Tr. pp. 70, 89 and 97] and appellee

advertised its products throughout the State of California [Tr. p. 70].

Said appellee Griesedieck delivered to appellants its particular form of sales delivery books and it required appellants to make delivery of appellee's beer products on said delivery slips. Griesedieck also delivered to appellants, its particular forms of "order confirmation." This form, which was approved by said appellee, was signed by appellants, *as agents and employees of said appellee* [Tr. p. 73].

Letterheads and envelopes of said appellee Griesedieck with said company's name and principal office address thereon, were sent to appellants in California for appellants' use *as agents of said appellee* [Tr. p. 74]. The appellants used said stationery, signing the same as agents and employees of said appellee and held themselves out to the various purchasers of beer products in the State of California *as agents and employees of said appellee* [Tr. p. 74]. Business cards of said appellee Griesedieck, likewise were sent to appellants for their use in California. Said cards showed the name of appellants *as agents of said appellee company* [Tr. p. 74]. Appellee, Griesedieck Western Brewery Co., was listed in the Central section of the telephone directories and the classified directories, issued by the Pacific Telephone Company in the County of Los Angeles, California [Tr. p. 74]. The said appellee paid appellant a commission on certain of its sales of appellee's beer products in California, and on other sales of its products, acknowledged the appellants as distributors [Tr. pp. 74 and 75].

Appellee Griesedieck kept a steady flow of its beer products coming into the State of California, between

1950 and November 30, 1954. The business of said appellee increased every year in the State of California, and in the year 1954, it became fifth in size of business done in the State of California among all breweries which imported beer into this state [Tr. p. 69]. The large volume of business of said appellee in California was due, in generous measure, to its direct and constant solicitation of business both through its officers, and through these appellants, as appellee's agents and representatives [Tr. p. 70].

The Drexel Distributing Company was one of the distributors of appellee Griesedieck's products in California [Tr. pp. 32-33].

The business done by said appellee in the State of California was a substantial part of its business, and because of the business done in California by said appellee, it regarded California as one of its chief markets [Tr. pp. 70 and 88].

Appellee Griesedieck acknowledged that it was doing business in California and that appellants were acting as its agents, as shown by excerpts from a few of its many letters. Typical of this said self-recognition are the following statements of Edward D. Jones, Griesedieck's president, contained in his letters to the corporation's own stockholders, also to the appellants, its agents and to various retail stores which were solicited for business directly by Griesedieck through its president.

Examples:

1. "I had planned to bring Sewing with me to California but I believe I would like to defer his coming along at this time because of some other ac-

tivities that we want him to take care of." [Tr. p. 76—letter to appellant, William R. LeVecke.]

2. "Do not arrange anything for me to do at night because either you or I will be very tired calling on supermarkets during the day." [Tr. pp. 76-77—letter to appellant, William D. LeVecke.]

3. "While there I called on about thirty supermarkets with our distributor, Mr. William LeVecke, LeVecke Distributing Company, 1807 East Olympic Boulevard, Los Angeles, California, Tel. Van Dyke 7944." [Tr. p 7—letter to California stockholders of Griesedieck.]

4. "I again want to thank you and your organization for the fine business you have been entrusting to us and you may be sure we appreciate this confidence." [Tr. p. 79—letter to Shopping Bag Stores.]

5. "Our representative, Mr. William LeVecke, reports getting our beers established in your good firm. We are most appreciative of this and you may be sure that we in the brewery will follow this account and do everything we can at this end to give you good service and satisfaction." [Tr. p. 81—letter to Pacific Merchantile Co.]

6. "I again want to thank you and your organization for the fine business you have been entrusting to us and you may be sure we appreciate this confidence." [Tr. p. 83—letter to United Grocers.]

7. "Mr. LeVecke and I called on 68 Safeway Stores and made a survey that was most comprehensive, starting in Tucson and ending in San Francisco. I am sure Mr. LeVecke would be happy to give you excerpts of this survey at any time you would like to know about it." [Tr. p. 84—letter to Safeway Stores.]

8. "I should like to emphasize that *we are on the Pacific Coast to stay,* as revealed in our financial statement that I gave to your Mr. Sorenson. You will believe me when I say that *we are financially responsible to carry out our obligations to you and* your dealers." (Emphasis ours.) [Tr. p. 84—letter to United Grocers.]

9. "I would like to reiterate that we are on the Pacific Coast to stay and if you will inspect our financial statement you will find that we are financially responsible and that we can carry out our responsibility to your good organization." [Tr. p. 86—letter to Certified Grocers.]

10. *"We are on the West Coast to stay. We are adding to our organization in the California area* and I am sending you one of our financial statements which will prove to you that we are financially responsible and prepared to carry out programs that we undertake." (Emphasis ours.) [Tr. p. 87—letter to A. D. Murrell—owner of retail stores.]

11. *"We have been on the Pacific Coast with our products Stagg and Hyde Park '75' for over a year.* Our business is increasing every day. It might interest you to know that *we ship a carload a day into the California area* and I would also like to emphasize that Stagg and Hyde Park '75' are premium products.

"I am sending you one of our financial statements so you will know our financial integrity and our ability to carry out and support our Mr. LeVecke's merchandising program." (Emphasis ours.) [Tr. p. 88—Vons Supermarkets.]

12. "Our representative, Mr. William LeVecke, 1807 East Olympic Boulevard, Los Angeles, California, will be happy to handle any special inquiry

that you may have regarding our company or products." [Tr. p. 89—letter to Duca and Hanley Supermarket.]

13. "I again want to thank you and your organization for the fine business you have been entrusting to us and you may be sure we appreciate this confidence." [Tr. p. 90—letter to Certified Grocers.]

14. "During the month of March the following persons purchased Griesedieck Western Brewery Company's stock: . . .

"A letter of welcome into the family of stockholders was written these people telling them you are our representative and that you sell Safeway Stores and to contact you for any further information." [Tr. p. 93—letter to appellant, William R. LeVecke.]

15. "I again want to thank you and your organization for the fine business you have been entrusting to us and you may be sure we appreciate this confidence." [Tr. pp. 96-97—letter to United Grocers.]

16. Also to the same effect is a letter from another executive of said appellee company:

"As usual, Mr. Jones returned from his trip to the West very much enthused about your operation and, as he put it, 'We have only scratched the surface.' One of these days I hope to have the opportunity of coming out and seeing your operation first hand . . ." [Tr. pp. 97-98—letter to appellant, William R. LeVecke from Hans Saemann—Asst. Advertising Manager.]

Appellee, Carling Brewing Company.

The appellee, Carling Brewing Company (sometimes herein referred to merely as "Carling"), at all times mentioned in the complaint in this action, was selling its beer products in the State of California.

The president of said corporation, Ian R. Dowie, in his affidavit filed in this action [Tr. pp. 51-58] admits that during the period in question:

1. That its products were distributed in California [Tr. p. 53].

2. That K. W. Burrie was its representative in California (evidently its manager) and that there were six other employees of the company, working under the direction of Mr. Burrie, in California [Tr. p. 54].

3. That the corporation had an office at 6399 Wilshire Boulevard, Suite 405-406, Los Angeles, California, and that said company is listed in the telephone directory as located at said address [Tr. p. 54].

4. That said employees performed the following services in California for their employer, Carling:

(a) They called upon wholesale distributors of beer and ale for the company [Tr. p. 54].

(b) They inspected the records of said distributors in order to report the volume of sales to the head office of the company and in order to direct said distributors to keep their records in a pattern recommended by Carling [Tr. p. 54].

(c) They encouraged and directed the distributors in their sales efforts of said Carling products and recommended the use of various sales materials for the said corporation's products [Tr. p. 55].

(d) They kept in constant contact with the distributors and retail customers and assisted them in popularizing the corporation's products [Tr. p. 55].

(e) They assisted the distributors to make sales of the corporation's products [Tr. p. 55].

Jurisdiction of United States District Court and United States Court of Appeals for the Ninth Circuit.

The statutory provisions sustaining such jurisdiction are:

(a) The United States District Court had jurisdiction by reason of Removal of the Action from the Superior Court of the State of California, County of Los Angeles, pursuant to Title 28, United States Code, Sections 1441, 1446 and 1447.

(b) The Order of the United States District Court granting the motion of the defendants to Set Aside, Vacate and Quash Service of Summons and Complaint is a final decision determining the rights of the parties involved therein, from which an appeal may be taken under Title 28, United States Code, Section 1291.

The pleadings showing the existence of jurisdictions, are:

(a) Complaint filed in the Superior Court of the State of California, in and for the County of Los Angeles [Tr. pp. 11-21, incl.].

(b) Petition for Removal to the United States District Court, Southern District of California, Central Division [Tr. pp. 3-7, incl.].

(c) Notice of Motion, and Motion to Set Aside, Vacate and Quash Service of Summons and Complaint on Griesedieck and Motion to Dismiss, and affidavits [Tr. pp. 23-48, incl.; 120-135, incl.].

(d) Notice of Motion, and Motion to Set Aside, Vacate and Quash Service of Summons and Complaint on Carling and Motion to Dismiss, and affidavits [Tr. pp. 49-62, incl.; 114-119, incl.].

(e) Affidavits in Opposition to defendants' (appellees') Motions [Tr. pp. 63-113, incl.; 136-143, incl.].

(f) Minutes of the United States District Court's order granting motion of each defendant to quash service of summons and complaint and denying motion to dismiss [Tr. p. 144].

(g) Order of the Court granting the Motions of the defendants Griesedieck and Carling to Set Aside, Vacate and Quash Service of Summons and Complaint [Tr. pp. 147-150, incl.].

(h) Petition for Rehearing [Tr. pp. 145-146].

(i) Minutes of the Court denying Rehearing [Tr. pp. 144-145].

(j) Notice of Appeal from the Order Granting Motions to Quash [Tr. p. 151].

Specification of Errors.

The specification of errors relied upon in this appeal by appellants are as follows:

1. The District Court erred in granting the Motion of appellee Griesedieck to Set Aside, Vacate and Quash Service of Summons and Complaint in this action and in making and entering its Order granting said Motion.

2. The District Court erred in granting the Motion of appellee Carling to Set Aside, Vacate and Quash Service of Summons and Complaint in this action and in making and entering its Order granting said Motion.

3. The business activities, including the solicitation of business, in the State of California, by appellees Griesedieck and Carling constituted "doing business" under the laws of the State of California, and made said appellees, and each of them, amenable to process in an action commenced in a court of the State of California and subsequently transferred to the United States District Court.

4. The District Court erred in quashing the service of Summons and Complaint on the appellees, and each of them, for the further reason that each of the appellees had appeared in said action by reason of the filing of their petitions for removal of the action from the Superior Court of the State of California, In and for the County of Los Angeles, to the United States District Court, for the Southern District of California, Central Division, and by reason of said appearances in said action, the said District Court had lost jurisdiction to quash service of said summons and complaint, as to each said appellee.

APPELLANTS' ARGUMENT.

A Foreign Corporation Which Enters the State of California for the Purpose of Carrying on There a Substantial Part of Its Ordinary Business, Is "Doing Business" in Said State When It Maintains a Continuing Business Activity Therein.

It is a well established rule of law in California that a foreign corporation which enters said state for the express purpose of doing a substantial part of its ordinary business therein, and thereafter maintains and carries on continuing business activities in said state, is "doing business" therein, so as to make it amenable to process issued out of the California courts.

The present action was instituted against the appellees in the Superior Court of the State of California in and for the County of Los Angeles, and thereafter the appellees filed their petitions for removal of the action to the United States District Court, Southern District of California, Southern Division. Thereafter pursuant to motions of appellees the said District Court made its Order Quashing Service of Summons and Complaint in said action on appellees, the Court stating in its Order that appellees were not doing business in the State of California.

In all of the affidavits filed, both in opposition to, and in support of, said motions, the evidence therein contained clearly shows that the appellees, and each of them, were doing business in California. The references to the facts hereinafter recited are contained in the foregoing "Statement of the Case" and need not be restated.

The appellee Carling had a business office located in the City of Los Angeles, and seven regular employees of

the company, including a manager. It was the duty of these employees to solicit business for the appellee Carling, throughout the States of California, Oregon and Washington. Their method of solicitation of business for said appellee was to set up distributors for their employer's beer products. After setting up said distributors, the said employees would keep in constant touch with them and would assist said distributors to make sales, to maintain a high level of sales, to keep records in the manner approved by the said appellee, and would furnish the said distributors with sales materials and direct them on how to use said materials most effectively. The said offices from which said employees worked were under the name of appellee, Carling Brewing Co., and the telephone number was listed under said appellee's name. The evidence clearly discloses that the company's sales efforts could have been no greater even though its main office had been located in California.

The evidence contained in said affidavits shows that the appellee Griesedieck did business by setting up a distributor's agency in the State of California which would take care of sales of its beer products in California and Arizona. The appellants acted as one of said distributors for Griesedieck and Drexel Distributing Company acted as the other distributor. In addition to setting up these distributors, as aforesaid, the said appellee took an active part in doing everything possible to maintain, and increase, the high level of sales of its beer products in California. It sent its president to California, on numerous occasions, to conduct sales tours through the state. Its president, in company with one of its distributors, one of the appellants herein, personally solicited business for said appellee company from all of the large grocery

stores and wholesale grocers in California. Said corporation president urged these stores and grocers to purchase its beer products and to help in increasing sales of appellee's beer products. In order that its beer products would be properly received in California, Griesedieck's president assured all these grocers that said corporation intended to remain in business in California and that its operations were not to be of short duration, but that it was permanently in business in the State of California and on the Pacific Coast.

As further assurance of said appellee's ability to remain in business in California, the said appellee sent a copy of its financial statement to each of said grocers and stores for the purpose, as stated by its president, of establishing that "we are financially responsible to carry out our obligations to you."

Thereafter, said appellee Griesedieck did a large volume of business in the State of California. In fact, its sales of its beer products in said state became so large that in the year 1954, it stood fifth in size among all brewery companies importing beer into California.

Some of the early cases on "doing business" leaned toward the principle, that mere solicitations by a foreign corporation for business in a state other than its origin, did not constitute "doing business" in said state. However, in recent years this rule, in the decisions of the Federal courts, the California courts and generally, has been "laid to rest" (as stated in the *Jeter v. Austin Trailer* case, *infra*), so that it is now well established that solicitation of business does constitute "doing business" in the state where the solicitations are made.

In *Koninklyke etc. v. Superior Court* (1951), 107 Cal. App. 2d 495, 237 P. 2d 297, the court (at p. 500, in 107 Cal. App. 2d) said of foreign corporations doing business in California:

> ". . . whether its business is interstate or local, it is within the jurisdiction of our courts . . . In the more recent decisions, solicitation, *without more,* constitutes "doing business" within a state when the solicitation is a regular, continuous and substantial course of business." (Emphasis ours.)

In *Jeter v. Austin Trailer Equipment Co.* (Dec., 1953), 122 Cal. App. 2d 376, 265 P. 2d 130, the court declared that the venerable rule that mere solicitation is not "doing business" had been laid to rest and the rule in California now is that solicitation of business is sufficient to constitute "doing business" in the State of California.

The court in the *Jeter v. Austin Trailer* case, at page 386 cites *Nippert v. City of Richmond* (1946), 327 U. S. 416, 66 S. Ct. 586, 90 L. Ed. 760, as follows:

> ". . . that mere solicitation, when it is regular, continuous and persistent, rather than merely casual, constitutes 'doing business,' contrary to formerly prevailing notions."

In the case of *Woodworkers Tool Works v. Byrne* (1951), 191 F. 2d 667 and 202 F. 2d 530, it was held that business activity maintained in a state by a foreign corporation constitutes "doing business."

In California it is established law that if the representation which a foreign corporation maintains in this state gives it substantially the same benefits it would enjoy by operating through its own office or paid sales

force, it is "doing business" in this state, even though said business is done through agencies.

Sales Affiliates v. Superior Court (1950), 96 Cal. App. 2d 134, 214 P. 2d 541;

Fielding v. Superior Court (1952), 111 Cal. App. 2d 490, 244 P. 2d 968;

Iowa Mfg. Co. v. Superior Court (1952), 112 Cal. App. 2d 503, 246 P. 2d 681;

Jeter v. Austin Trailer Equipment Co. (1953), 122 Cal. App. 2d 376, 265 P. 2d 130.

The courts of California have further declared that the particular method of operation by a foreign corporation in this state is immaterial and that the essential thing is whether or not it is actually "doing business," without regard to whether it is "doing business" through independent contractors, agents, employees, or in any other manner.

Fielding v. Superior Court (supra);

Iowa Mfg. Co. v. Superior Court (supra);

Thew Shovel Co. v. Superior Court (1939), 35 Cal. App. 2d 183, 95 P. 2d 149.

In *Frene v. Louisville Cement Co.* (1943), 134 F. 2d 511, 146 A. L. R. 926, the United States Court of Appeals for the District of Columbia held that regular solicitation by a Kentucky corporation of business, which was continuous, and constituted a substantial part of the business of the foreign corporation, constituted "doing business" in the District of Columbia.

A case similar to the one here on appeal was presented in the case of *Perkins v. Louisville & N. R. Co.* (1951), 94 Fed. Supp. 946. This case arose in the United States

District Court, Southern District of California, Central Division, the Honorable James N. Carter, District Judge, presiding. In the Perkin's case the question was whether or not the solicitation of business within the State of California by a foreign corporation maintaining an office in the City of San Francisco, California, constituted doing business so as to render the corporation subject to the jurisdiction and process of the state courts. The action was brought by a California resident against a railroad corporation, incorporated in the State of Kentucky, for personal injuries incurred while alighting from the defendant's train in Tennessee. The action was initially filed in the Superior Court of California.

The court in said case stated (at p. 948) that

> "whether the corporation was present or doing business within the state so as to make it amenable to the state's process, is undoubtedly a question of substantive law and is to be decided primarily by the decisions and statutes of the State of California. (*Erie R. Co. v. Tompkins* (1938), 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.)"

In his decision Judge Carter (at p. 950) also quoted from the opinion of Justice Rutledge in the case of *Frene v. Louisville Cement Co.* (*supra*), in which the Justice said

> "In general, the trend has been toward a wider assertion of power over non-residents and foreign corporations than was considered permissible when the tradition about 'mere solicitation' grew up."

In the *Perkins case, supra,* Judge Carter stated *that solicitation was a necessary step in the operation of a business,* and that when this solicitation took place within

a state, it constituted the operation of a business in the state.

He stated further, that the California courts had recently passed on the question of solicitation constituting the doing of business, on numerous occasions, and that it was apparent that in California the courts had taken a broad view of the concept of doing business by a foreign corporation. He said (at p. 948):

> "The California courts have had numerous occasions to pass upon the question now before us. It has been said that to be doing business in California in a jurisdictional sense, a foreign corporation must transact in this state some substantial part of its ordinary business through its agents or officers selected for that purpose. (*Jameson v. Simonds Saw Co.* (1906), 2 Cal. App. 582, 84 Pac. 289; *Milbank v. Standard Motor Const. Co.* (1933), 132 Cal. App. 67, 22 P. 2d 271; *Charles Ehrlich & Co. v. J. Ellis Slater Co.* (1920), 183 Cal. 709, 192 Pac. 526; *Davenport v. Superior Court* (1920), 183 Cal. 506, 191 Pac. 911. A California Court has recently held that a foreign manufacturing corporation was present within the state through the activities of its distributors who acted as agents although not intended to be such. (*Thew Shovel Co. v. Superior Court* (1939), *(supra)*. See also *West Pub. Co. v. Superior Court* (1942), 20 Cal. 2d 720, 128 P. 2d 777.)"

In said *Perkins* case *(supra)*, the court pointed out (in the above quoted excerpt) that a foreign corporation was present in California through the activities of its distributors although it did not intend to be present in said state. This is the identical situation in this action now on appeal to this Court, that is, both Griesedieck and Carling were doing business in California because of the

activities of their distributors, even though said appellees may not have intended to be.

After this decision in the *Perkins* case, the California courts have rendered decisions in the cases of *Iowa Mfg. Co. v. Superior Court (supra), Jeter v. Austin Trailer Equipment Co. (supra)* and *Koninklyke, etc. v. Superior Court (supra),* each of which has passed directly upon issues identical to those involved in this case, and have firmly adopted and reemphasized the rule that mere solicitation does constitute "doing business" in the State of California.

Subsequent to the order made in this case now on appeal, granting the motion to quash service, the case of *Duraladd Products Corporation v. Superior Court* was decided by the District Court of Appeal of the State of California, on June 29, 1955, and is reported in 134 A. C. A. 266, (285 P. 2d 699). The rule in that case relating to a foreign corporation "doing business" in this state, if applied to the facts of this case, would require the court in this case to hold that appellees here are amenable to process issued out of the state courts. In the cited case, the Duraladd Products Corporation, a foreign corporation, was made a defendant in an action for personal injuries resulting to the plaintiff from the collapse of a ladder. The ladder was purchased by a retailer from Larson Ladder Company, a Los Angeles concern, which in turn had purchased the ladder in unassembled form, from the Duraladd Products Corporation. The Duraladd Products Corporation petitioned the California District Court of Appeal for a Writ of Prohibition to enjoin the trial court from proceeding further against said defendant in the action and to vacate an order denying the corpora-

tion's motion to quash substituted service made on it in said action in the state court.

The District Court of Appeal held that the Larson Ladder Company was the representative and distributor of the Duraladd Products Corporation in the State of California and said:

> "In the instant case we have a situation where the Larson Company was not only an exclusive distributor, but, insofar as it assembled parts into a completed whole, it participated in the final stages of manufacture of Duraladd's products. Such products were purchased outright by the California concern and Duraladd had no financial interest whatever in them from the time of shipment. However, it is apparent that Duraladd maintained a continuous course of business with the California company and continued after the original installation of the assembly equipment to maintain an interest in seeing that the assembling was done properly; and, also, Duraladd was obviously interested in maintaining the volume of California sales and to that end furnished advertising material. In the agreement between petitioner and Larson Ladder Company it is provided, among other things, that 'It is the intention of the parties listed in the within agreement that Mr. Dodd of the corporation shall make annual visits to Larson for the purpose of technical consultation.' Duraladd, at least tacitly, held out Larson Ladder Company as its California distributor or representative."

The court further stated that the facts showed that Duraladd did no advertising in California but that the Larson Ladder Company put out a catalog sheet, stating that it was the distributor for Duraladd; that the Duraladd Company furnished the plates for this brochure and

composed the copy. The court said that the application of the rules laid down in the case of *Fielding v. Superior Court (supra), Sales Affiliates v. Superior Court (supra)* and other late California cases, made it clear that the activities of Duraladd in the State of California brought it within the framework of the "doing business" concept for the purpose of the state court acquiring jurisdiction and making the corporation amenable to its process.

The business activities of appellees in the State of California far exceeded the activities of the Duraladd Corporation, in the California case last cited. If the activities of the Duraladd corporation in California constitute "doing business" in said state then by the application of the same principles to the facts in this case, it must necessarily follow that appellees were, and are, fully amenable to the process issued in this action by the Superior Court of California.

Conclusion.

From the affidavits, and exhibits thereto attached, filed by appellants and appellees in this action, it is clear, that both of the appellees, Griesedieck and Carling, were "doing business" within the State of California under the principles, firmly established by the various federal, California and other state court decisions. The appellees here, by their activities in California have obtained the same full and complete business advantages and privileges that would have accrued to them if their head office had been located here or if they had been incorporated as a California corporation.

Each of the appellees admits that it had agents in California soliciting and acquiring a great deal of business for it. The evidence and facts set forth in the

various affidavits show that each of appellees had offices in this State through which its products were channeled into commerce in California.

This is not a *border-line* case. On the contrary, the business activities, in California, of appellees here were far more extensive than the business activities considered in most, if not all, of the cases cited herein, holding that the foreign corporation involved was doing business within the state, and therefore was amenable to process of the state courts.

By reason of the abundant, uncontradicted and conclusive facts established herein, appellants believe that the District Court's order on the motion quashing service of summons and complaint on the appellees should be reversed and that said appellees should be required to answer said complaint and proceed to trial of the action.

Respectfully submitted,

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Attorneys for Appellants.

No. 14816.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM R. LEVECKE and REED LEVECKE, doing business as the LEVECKE COMPANY,

Appellants,

vs.

GRIESEDIECK WESTERN BREWERY CO., a corporation, and CARLING BREWING COMPANY, a corporation,

Appellees.

APPELLEES' BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

PAGE

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APPELLEES' BRIEF.

Statement of Jurisdiction.

The plaintiffs-appellants filed an action against appellee The Griesedieck Company (formerly known as Griesedieck Western Brewery Company) and appellee Carling Brewing Company, Incorporated, in the Superior Court of the State of California, in and for the County of Los Angeles, on February 24, 1955. [Tr. pp. 11 *et seq.*]

On March 29, 1955, service of summons and complaint having been attempted upon appellee The Griesedieck Company by service upon the Secretary of State for the State of California, and service of summons and complaint having been attempted upon appellee Carling Brewing Company, Incorporated, by service upon an employee, each appellee filed a petition for removal of said action

from the Superior Court of the State of California to the United States District Court, Southern District of California, Central Division. Each appellee filed its undertaking on removal at the same time. The petitions for removal were filed pursuant to Title 28, United States Code, Sections 1441 and 1446.

Thereafter, on April 4 and 11, 1955, each appellee filed a notice of motion, and a motion, to set aside, vacate and quash the service of summons and complaint, and a notice of motion and a motion to dismiss the complaint. [Tr. pp. 23-25, 49-51.] Said motions duly came on to be heard together on oral argument and affidavits.

Thereafter, on May 12, 1955, the District Court made its order granting the motion to set aside, vacate, and quash the service of summons and complaint because of lack of jurisdiction of the Court over the person of each of appellees and because of insufficiency of service of process upon them. The motion to dismiss was denied. [Tr. pp. 147-150.] The order granting the motion to set aside, vacate and quash service of summons and complaint was docketed and entered on May 13, 1955. [Tr. p. 150.]

The appellants have appealed from this order, as a final decision, pursuant to Title 28, United States Code, Section 1291.

Preliminary.

It is not amiss to point out at this time that certain of the evidence introduced by the parties before the District Court was in sharp conflict.

This factor is of extreme importance in this appeal because the plaintiffs' entire case is based upon *their* version of those facts to which the conflicting evidence related.

Under these circumstances this appeal must avail them nothing, for:

> "All controverted questions of fact must be taken in their most favorable possible light for the (party) who prevailed at the trial. Rule 52(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A."
>
> *United States v. Comstock Extension Mining Co., Inc.,* 214 F. 2d 400, 403 (9th Cir., 1954).

See, also:

> *Palakiko v. Harper,* 209 F. 2d 75, 89 (9th Cir., 1953).

Statement of the Case.

Introductory.

Appellants have omitted from their brief a Statement of the Case, choosing, rather, to present under the topic "Facts" a discussion which is argumentative, inaccurate and incomplete in many particulars. They state but a small portion of the evidence in affidavit form upon which the District Court made its Order, with the result that they do not give a fair or complete statement of the case. Consequently, appellees find it necessary to give their own statement of the case. The many omissions from appellants' discussion of the facts will be supplied in this statement, and the inaccuracies and unwarranted inferences from the evidence contained in appellants' treatment under the topic "Facts" will be noted separately at the end of this statement.

Due to the factual differences with respect to The Griesedieck Company and Carling Brewing Company, Incorporated, each appellee will be treated separately in this statement of the case.

The sole issue involved in this appeal is whether or not the District Court had jurisdiction over appellees on the causes of action alleged by plaintiffs. Decisive of that question is whether or not The Griesedieck Company was "doing business" in California, whether California has assumed jurisdiction over a cause of action arising out of the state and which is unrelated to business carried on in the state, and whether due process is satisfied if a corporation engaging only in the interstate business in California is forced to defend there a claim arising outside the state and which is unrelated to business done in California.

These questions arose in the following manner:

(a) The Griesedieck Company.

Prior to November 1, 1954, Griesedieck Western Brewery Company was engaged in manufacturing and selling beer from its brewery and offices in Belleville, Illinois, and from its brewery and offices in the City of St. Louis, Missouri. On November 1, 1954, Griesedieck Western Brewery Company sold and transferred to Carling Brewing Company, Incorporated, for cash, all of its brewing assets, equipment, real estate, plants and inventory, and has not engaged in the brewing business at any time thereafter. Since that time Griesedieck Western Brewery Company has been known as The Griesedieck Company. [Tr. pp. 26-27.]

Prior to the sale of its business, such business as Griesedieck Western Brewery Company (hereinafter referred to as Griesedieck) did with respect to purchasers located in California consisted of the following:

(1) The receipt and acceptance in Belleville, Illinois, or in St. Louis, Missouri, of orders from the

plaintiffs and from Drexel Distributing Company, both located in California. [Tr. p. 27.]

(2) The filling of these orders by the shipment of its products by railroad common carrier from its plant in Illinois or from its plant in Missouri to the two purchasers in California. [Tr. p. 27.]

(3) All shipments fulfilling these orders originated at either of the company's two plants outside California and such sales were made and billed f.o.b. the plants of Griesedieck. [Tr. p. 27.]

(4) On all sales made by Griesedieck to the two purchasers in California the title to the merchandise passed to the purchaser at the time of delivery by Griesedieck to the railroad carrier in Illinois or Missouri, and all invoices and statements relating to such sales were mailed from the company's offices in Illinois or in Missouri direct to the purchasers. [Tr. p. 27.]

Prior to November 1, 1954, when appellee Griesedieck sold its brewing assets, equipment, real estate, plants and inventory to the appellee Carling Brewing Company, Incorporated (hereinafter referred to as Carling), Griesedieck notified the plaintiffs of the contemplated sale, and that following the date of such sale Griesedieck would no longer be engaged in the brewing business and would thereafter ship no more beer to the plaintiffs. [Tr. p. 112.]

Since November 1, 1954, appellee Griesedieck has not sold or shipped beer to purchasers in California or elsewhere, or engaged in any activities relating to the beer industry. [Tr. pp. 26, 28.]

(b) Carling Brewing Company, Incorporated.

Carling Brewing Company, Incorporated, is a Virginia corporation, licensed to do business in the State of Ohio, which is the state of its principal place of business. [Tr. p. 51.]

Prior to November 1, 1954, Carling Brewing Company for many years engaged in the manufacture and sale of beer from its brewery located in Ohio. [Tr. p. 52.]

On November 1, 1954, Carling acquired by purchase from Griesedieck all of the latter's brewing assets, equipment, real estate, plants and inventory, and since that date has also engaged in manufacturing and selling beer from its brewery and offices in Belleville, Illinois, and St. Louis, Missouri, respectively. [Tr. p. 52.]

At all times material in the complaint Carling was selling in interstate commerce its beer products in the State of California. Since November 1, 1954, when it acquired the assets and property of Griesedieck, Carling has not sold in California the beer products formerly manufactured by Griesedieck and which Griesedieck formerly sold to the plaintiffs. [Tr. p. 145.]

On February 24, 1955, plaintiffs filed their action for breach of contract and fraud.

(c) The Evidence as It Relates to The Griesedieck Company

The District Court made its order quashing service of summons and complaint upon The Griesedieck Company upon evidence which showed that:

(1) The only business which Griesedieck has ever done with respect to purchasers in California was done prior to November 1, 1954, and was done in

the course of interstate commerce between itself and two purchasers. [Tr. pp. 26, 27.]

(2) Such business consisted of the receipt and acceptance of orders from the plaintiffs and from Drexel Distributing Company, both located in California, and the filling of said orders by the shipment of its products by railroad common carrier from its plant in Illinois and from its plant in Missouri to the two purchasers residing in California. [Tr. p. 27.]

(3) All such shipments originated at either of the company's two plants outside California and such sales were made and billed f.o.b. the plants of Griesedeick, and that on all sales made to the two purchasers in California the title to the merchandise passed to the purchaser at the time of delivery by this defendant to the railroad carrier in Illinois or in Missouri. [Tr. p. 27.]

(4) All invoices and statements relating to such sales were mailed from Griesedieck's offices in Illinois or in Missouri direct to the purchasers. [Tr. p. 27.]

(5) The plaintiffs, as a wholesaler and independent distributor of Griesedieck's products in California, sold beer to such wholesale and retail outlets as they chose to obtain. [Tr. p. 27.]

(6) The plaintiffs purchased beer from Griesedieck as principals on their own account and were billed for all such purchases at time of shipment, paying the wholesale price for the beer. [Tr. p. 27.]

(7) The plaintiffs were responsible for, and paid to the carrier, all transportation charges from point of origin to destination of the shipment. [Tr. p. 27.]

(8) The plaintiffs resold on their own account the beer they had purchased from the defendant; that they had sole responsibility for fixing prices on sales by them and for the billing and collection of their accounts, without any control or supervision by Griesedieck. [Tr. pp. 27, 28.]

(9) Griesedieck did not require the plaintiffs to maintain any records for it, to collect any data, or to file any reports with it with respect to the plaintiffs' operation of their business or with respect to their disposition of the beer sold by Griesedieck to them. [Tr. p. 28.]

(10) Neither of the plaintiffs was ever an officer or employee of Griesedieck; that neither plaintiff ever received a salary, an expense account or other personal compensation from Griesedieck. [Tr. p. 28.]

(11) Griesedieck had never done any of the following acts:

(a) Maintained an office or place of business in the State of California [Tr. p. 29];

(b) Owned or leased any real estate in the State of California [Tr. p. 29];

(c) Owned, leased or operated any personal property in the state of California [Tr. p. 29]:

(d) Maintained or leased a warehouse in the State of California [Tr. p. 29];

(e) Maintained an inventory or stock of goods in the State of California [Tr. p. 29];

(f) Had any salesmen or other employees working within the State of California or soliciting orders in the State [Tr. p. 29];

(g) Advertised by newspaper, radio, television, billboards or in any other manner within the State of California, any advertising within California of Griesedieck's products being done by the plaintiffs [Tr. p. 29];

(h) Authorized the listing of its corporate name in any telephone or other directory published within the State of California [Tr. p. 29];

(i) Been assessed any taxes by the State of California or paid any to said State [Tr. p. 29];

(j) Applied for or received any licenses or permits from the State of California for the purpose of manufacturing, selling, importing or otherwise engaging in its business within said State [Tr. p. 29];

(k) Listed a California office or agent on its stationery [Tr. p. 30];

(l) Had an officer or employee who ever resided in California during such employment [Tr. p. 30];

(m) Shipped to the plaintiffs or to anyone else in California on a consignment basis [Tr. p. 30];

(n) Shipped its products to California in equipment owned or leased by it [Tr. p. 30];

(o) Made local deliveries within California of its products [Tr. p. 30];

(p) Maintained a bank account in the State of California [Tr. p. 30];

(q) Made collections or received any payments for its merchandise within the State of California [Tr. p. 30];

(r) Made any purchases within California of goods or supplies [Tr. p. 30];

(s) Lent any money to the plaintiffs or to any of their customers within the State of California [Tr. p. 30];

(t) Entered into any contracts or solicited any orders within the State of California [Tr. p. 30].

(12) On four occasions, over a period of five years, the then president of Griesedieck, at the request of the plaintiffs, accompanied one or both of the plaintiffs in visits to the customers of the plaintiffs, and that on these occasions no attempt was made on the part of Griesedieck to solicit orders for sales of beer, and the president of Griesedieck made no such sales. [Tr. p. 124.]

(13) On one occasion Griesedieck shipped business cards to the plaintiffs which were void of printing except for the colored trade mark of Griesedieck's products. [Tr. pp. 120, 128-130.]

(14) On one occasion Griesedieck, at the request of plaintiffs, shipped them a small number of the sales delivery books which Griesedieck used in making its deliveries of beer in Missouri, and which the plaintiffs represented they wished to use as a form in making their own sales delivery books. These delivery books were intended only to be used in Missouri, and the plaintiffs were never required, authorized or requested to use such delivery books in California, and if they were used such use was without the knowledge or authorization of Griesedieck. [Tr. p. 132.]

(15) Griesedieck did not authorize or have knowledge of the fact that plaintiffs printed, or had printed on the blank business cards which Griesedeick sent to them at their request the corporate name of Griesedieck. [Tr. pp. 128-130.]

(16) Griesedieck did not authorize, or have knowledge of, or pay for, the listing of its corporate name in the Los Angeles Telephone directories. [Tr. p. 134.]

(d) Appellants' Erroneous Statements, Conclusions and Inferences.

As is set out at length in the argument, *infra,* the crux of appellants' brief is that since Mr. Edward Jones, then president of Griesedieck, made four trips to California, at the request of the plaintiffs, and accompanied one of the plaintiffs in visiting stores which were customers of the plaintiffs, and later wrote letters to these retailers, that this constituted such activities as to bring Griesedieck within the jurisdiction of courts of California by means of service on the Secretary of State.

It must be pointed out in this connection that Mr. Jones did not make "frequent" or "numerous" visits to California, but that he visited the state on but four occasions over a period of five years. [Tr. p. 124.]

In the interest of brevity and clarity the further misstatements, erroneous inferences and inaccuracies in Appellant's brief will be treated numerically with the evidence relating thereto set out below.

(1) "Said appellee Griesedieck delivered to appellant its particular form of sales delivery books and it required appellants to make delivery of appellee's beer products on said delivery slips." (App. Br. p. 5.)

Appellants' Evidence.

"That said defendant (Griesedieck) delivered to plaintiffs sales delivery books and required plaintiffs to make delivery of defendant's beer products on said delivery books. . . ." [Tr. p. 73.]

Appellee's Evidence.

". . . these sales delivery books were obtained from (Griesedieck) by (the plaintiffs) at their request and upon their representation that they wanted to use said delivery books as a form to follow in preparing sales delivery books used by their company . . . Griesedieck did not at any time require the LeVeckes to make delivery . . . on delivery slips illustrated by said Exhibit G . . . nor did it authorize the (plaintiffs) to use sales delivery books printed in the name of (Griesedieck)." [Tr. p. 132.]

(2) "Griesedieck also delivered to appellants, its particular form of 'order confirmation'. This form, which was approved by said appellee, was signed by appellants, *as agents and employees of said appellee.*" (Their emphasis; App. Br. p. 5.)

Appellants' Evidence.

"that on all large sales of beer in California, the orders for said sales were

Appellee's Evidence.

"Said form was not used by (Griesedieck) nor was the use of said form by

Appellants' Evidence.

confirmed on an 'Order Confirmation,' the form of which was approved by said defendant and was signed by plaintiffs as agents and employees of said defendant." [Tr. p. 73.]

Appellee's Evidence.

(the plaintiffs) ever approved by (Griesedieck) . . . If said form were used by (the plaintiff) . . . then such use was for its own purposes and without the knowledge or approval of (Griesedieck)." [Tr. p. 133.]

(3) "Letterheads and envelopes of said appellee Griesedieck with said company's name and principal office address thereon, were sent to California for appellant's use *as agents of said appellees.*" (Their emphasis; App. Br. p. 5.)

Appellants' Evidence.

"Letterheads and envelopes of defendant (Griesedieck) with said company's name and principal office address were sent to plaintiffs in California for use by plaintiffs as agent of said defendant." [Tr. p. 74.]

Appellee's Evidence.

"Cuts of Hyde Park and Stag beer trademarks were supplied by (Griesedieck) to the LeVeckes and they were authorized to use them on their own business letterhead . . . The company files contained a request from (plaintiffs) . . . for a Stag cut and for two hundred Hyde Park 75 and two hundred Stag envelopes. I had no knowledge of this request, but upon questioning former clerical employees of (Griesedieck) I am informed that the materials were sent

Appellants' Evidence.

Appellee's Evidence.

to the LeVeckes shortly after receipt of the request. I have no knowledge of any request by the LeVeckes for authority to use (Griesedieck) envelopes or letterheads as agents or employees of (Griesedieck) and no authority was given to (the plaintiffs) to use said material in any manner which would represent that they were acting as agents or employees of said company." [Tr. p. 134.]

(4) "Business cards of said appellee Griesedieck, likewise were sent to appellants for their use in California. Said cards showed the name of appellants *as agents of said appellee company.*" (Their emphasis; App. Br. p. 5.)

Appellants' Evidence.

"Business cards of said defendant (Griesedieck) were sent to plaintiffs in California for use of the latter in California. Said cards show the names of plaintiffs as agents of (Griesedieck)." [Tr. p. 74.]

Appellee's Evidence.

"Cavanagh Printing Company printed large numbers of such blank business cards, with the Stag or Hyde Park trade-mark on them, for delivery in various parts of the country to distributors . . . In all such instances the business cards were blank except for the printed trademark." [Tr. p. 121.]

"The business cards sent by the printing company in

Appellants' Evidence.

Appellee's Evidence.

accordance with my direction, and in response to this request of Reed LeVecke, were blank except for the colored trademarks . . ." [Tr. p. 129.]

"I am employed by the Cavanagh Printing Company . . . I was in charge of the (Griesedieck) account and responsible for orders received from that company . . . These cards were blank except that the Hyde Park '75' beer trade-mark was printed on one thousand of them and the Stag beer trade-mark was printed on the other thousand. There was no other printing on the cards when they were mailed to (the plaintiffs)." [Tr. p. 120.]

(5) "Appellee (Griesedieck), was listed in the Central section of the telephone directories and the classified directories, issued by the Pacific Telephone Company in the County of Los Angeles, California." (App. Br. p. 5.)

Appellants' Evidence.

Appellee's Evidence.

"The said defendant (Griesedieck) is, and has been since 1952, listed in the Central section of the

"(Griesedieck) did not at any time cause its corporate name to be listed in any telephone directory in

Appellants' Evidence.

telephone directory and the Classified directory of the Pacific Telephone and Telegraph Company in the County of Los Angeles, State of California . . ."

Appellee's Evidence.

California; nor did (Griesedieck) at any time have knowledge of said listing; nor did (Griesedieck) at any time authorize the (plaintiffs) to list the corporate name of (Griesedieck) in any telephone directory. (Griesedieck) did not pay the cost of any such listing and if the listing was done, it occurred without the knowledge or consent of said Company." [Tr. pp. 134-135.]

(6) "Appellee sent out advertising matter to appellants, directed appellants on how to carry out their sales programs to increase the sale of appellee's products [Tr. pp. 70, 89, 97] and appellee advertised its products throughout the State of California. (App. Br. p. 4.)

Appellants' Evidence.

"That the said defendant (Griesedieck) at all times directed plaintiffs how to advertise and sell defendant's beer products and controlled the prices at which its beer products were sold in the State of California." [Tr. p. 70.]

Appellee's Evidence.

"From time to time, the company sold or furnished the plaintiffs various items of point-of-purchase advertising material. These accompanied merchandise being shipped to plaintiffs by railroad carrier, and title to all such material passed to plaintiffs upon delivery to the carrier in Missouri and Illinois. The subse-

Appellants' Evidence.

Appellee's Evidence.

quent use of the material in California by the plaintiffs was at their sole discretion." [Tr. pp. 31-32.]

"The plaintiffs, as a wholesaler and independent distributor of this defendant's products in California, sold beer to such wholesale and retail outlets as they chose to obtain. The plaintiffs purchased beer on their own account as principals . . . (and) resold on their own account the beer which they had purchased from this defendant; they had sole responsibility for fixing prices on sales by them and for the billing and collection of their accounts, without any control or supervision by this company. This company did not require the plaintiffs to maintain any records for it, to collect any data, or to file any reports with it with respect to the plaintiff's operation of their said business or with respect to their disposition of the beer sold by this defendant to them." [Tr. pp. 27-28.]

(7) "The business done by said appellee in the State of California was a substantial part of its business, and because of the business done in California by said appellee, it regarded California as one of its chief markets." (App. Br. p. 67.)

Appellant's Evidence.	*Appellee's Evidence.*
"That the business done by said defendant in the State of California was a substantial part of its business, and because of the business done in California by the said defendant, the latter regarded California as one of its chief markets." [Tr. p. 70.]	"During the period 1950 to 1954 the volume of shipments by (Griesedieck) to California was less than one (1) per cent of the total sales of said company in each of said years." [Tr. p. 125.]

These erroneous statements, inferences, and conclusions, do not, by any means, cover all of such which are contained in Appellants' statement of "Facts," but to further itemize them and to set out the rebutting evidence would make this brief unnecessarily prolix.

It requires but a brief perusal of the evidence in affidavit form to conclude that there are few "Facts" contained under that heading in appellants' brief.

(e) The Evidence as It Related to Carling Brewing Company Incorporated.

The District Court made its order quashing service of summons and complaint upon Carling Brewing Company Incorporated upon evidence which showed that:

(1) At no time has Carling Brewing Company Incorporated (hereinafter referred to as Carling)

sold any of its merchandise to the plaintiffs, or to any other persons, firms or corporations in the State of California or elsewhere through the plaintiffs, either directly or indirectly. [Tr. p. 52.]

(2) All business done by Carling with respect to purchasers located in California was and is done in the following manner:

(a) Orders from purchasers in California for merchandise manufactured by Carling are placed with Carling upon written order blanks and are subject to acceptance only at Cleveland, Ohio. [Tr. pp. 52-53.]

(b) All shipments of merchandise destined for California originated at the Cleveland, Ohio, plant of Carling and such sales were and are made and billed f. o. b. Cleveland, Ohio. [Tr. p. 53.]

(c) Title to merchandise of Carling sold to California purchasers passes to such purchasers at the time of delivery by Carling to the railroad common carrier in Cleveland, Ohio. [Tr. p. 53.]

(d) All invoices and statements relating to such sales were and are mailed from the Cleveland office of Carling direct to the California purchasers of Carling products. [Tr. p. 53.]

(e) All the California purchasers of Carling's products were and are wholesale distributors of Carling's products in California. [Tr. p. 53.]

(f) California wholesale purchasers of Carling's products were in all instances responsible for and paid all transportation charges from Cleveland, Ohio, to the destination. [Tr. p. 53.]

(g) Carling maintained and maintains a West Coast Regional representative, who had and has desk space in a Los Angeles office. Telephone listings were maintained at this address in the name of Carling. The regional representative has six field representatives working under his direction on the West Coast, and four of these spend a substantial amount of their time in California. [Tr. p. 54.]

(h) The regional representative and the field representatives engage in the following activities: call upon wholesale distributors of Carling's products for the purpose of examining records, and making recommendations to encourage sales efforts; accompany sales representatives of the distributors in visiting customers of the distributors, but they do not solicit orders or sales from these customers, the purpose of their visits being the promotion of the good will of the company. [Tr. pp. 54-55.]

(3) That Carling has never done any of the following acts:

(a) Maintain an inventory or stock of goods in the State of California, or fill orders from a stock of its beer and ale in California. [Tr. p. 56.]

(b) Have any salesmen or other employees accepting orders for Carling in the State of California. [Tr. p. 56.]

(c) Fix prices for its merchandise in California, nor approve sales in California; acceptance of orders from California was made in Cleveland, Ohio, and prices for the company's merchandise were established only in Cleveland. [Tr. p. 56.]

(d) Ship its merchandise to any purchaser in California on a contingent basis. [Tr. p. 56.]

(e) Ship its products to California, or elsewhere, by any transportation means owned or leased by it. [Tr. p. 57.]

(f) Make local deliveries within California of its products in any manner whatsoever. [Tr. p. 57.]

(g) Maintain a bank account in the State of California; [Tr. p. 57.]

(h) Make collections or receive any payments for its merchandise within the State of California. [Tr. p. 57.]

(i) Make any purchases within the State of California of ingredients, goods or supplies relative to its products. [Tr. p. 57.]

(j) Lend any money or have any interest in any of the independent wholesale distributors handling the merchandise of Carling within the State of California. [Tr. p. 57.]

(k) Lend any money to the plaintiffs or have any business relation with the plaintiffs either in the State of California or elsewhere. [Tr. p. 57.]

(l) Have any officer resident in California or other employee or agent in California authorized to accept service of process upon it. [Tr. p. 57.]

(4) None of the activities of Carling Brewing Company, or of any of its employees or representatives in the State of California, have any relationship to nor have they given rise to the liabilities sued upon by the plaintiffs as stated by the plaintiffs in their complaint [Tr. pp. 55-56], nor was either of the plaintiffs ever an officer or employee of Carling. Neither plaintiff ever served Carling in the State of California, or elsewhere, as agent, distributor, or in any other capacity whatsoever. [Tr. pp. 53, 54.]

ARGUMENT.

THE GRIESEDIECK COMPANY.

Summary of the Argument.

The Griesedieck Company was engaged solely in interstate commerce, and the California statutes do not permit service upon the Secretary of State as substituted service in such situations (Cal. Corp. Code, Sec. 6300), and for this reason the Order of the District Court must be affirmed.

Even if California Corporations Code, Section 6300, did not bar service of summons on the Secretary of State in this case, the Order of the District Court must still be affirmed, as the California statutes do not permit such substituted service on corporations which have withdrawn from doing interstate business in California, permitting it only in the case of withdrawals from intrastate business. (Cal. Corp. Code, Sec. 6504.)

In such circumstances this court need never reach the merits of the case in order to affirm the District Court.

But even should the merits be considered, the District Court must still be affirmed because appellants' entire case is based upon evidence as to which there was substantial conflict. When these controverted questions of fact are construed in the light most favorable to appellee Griesedieck, as they must under Rule 52(a) of the Federal Rules of Civil Procedure (*United States v. Comstock Extension Mining Co., Inc.*, 214 F. 2d 400, 403 (9th Cir., 1954)), the result is that appellants have no case.

For the theories of appellants' appeal are that (1) Griesedieck "solicited" orders and, (2) because the appellants did certain acts on their own part, without authority from and knowledge of Griesedieck, these acts bind Griesedieck, and therefore it may be "found" in California.

These theories are fallacious for the reasons that (1) Griesedieck did not solicit orders in California; (2) even if Griesedieck had solicited orders, this is not sufficient under California law upon which to base a finding of doing business because solicitation alone has never been held enough in California, and for the further reason that solicitation must be continuous and systematic in order to bring the foreign corporation within the state; (3) California law is settled that a resident of the state, by his unauthorized acts which purport to make him an agent, cannot bind an out of state corporation. (*Jameson v. Simonds Saw Co.,* 2 Cal. App. 582 (1906); *Smith & Wesson, Inc. v. Municipal Court,* 136 Cal. App. 2d ..... (136 A. C. A. 757, 763 (1955).)

Finally, appellants case must fail because even should Griesedieck be found to be "doing business" under the California law, such a finding would be violative of due process under the rule of *International Shoe Co. v. Washington,* 326 U. S. 310, 90 L. Ed. 95, 66 S. Ct. 154 (1945).

I.

California Statutes Do Not Permit Service of Summons and Complaint on Foreign Corporations by Service on the Secretary of State Where Such Corporations Are Engaged Solely in Interstate Commerce.

A. Griesedieck Was Engaged Solely in Interstate Commerce, in so Far as Its Activities Related to California.

The rule has long been established that the mere shipment of goods or products into a state in fulfillment of a contract of sale constitutes interstate, as distinct from intrastate, commerce.

> "Manifestly, the sales, followed by the delivery of the pianos in this state, upon orders sent from this state to the appellant in the state of Illinois, are transactions in interstate commerce and beyond the scope of the statute."
>
> *W. W. Kimball Co. v. Read,* 43 Cal. App. 342, 345 (1919);

See also,

> *Charlton Silk Co. v. Jones,* 190 Cal. 341 (1923);
>
> *Indian Oil Refining Co., Inc. v. Royal Oil Co.,* 102 Cal. App. 710 (1929).

Evidence before the District Court bearing on the interstate nature of Griesedieck's business in California was uncontradicted. This evidence showed that Griesedieck's business, in so far as it related to California, consisted of receiving, accepting, and filling orders at its plants in Illinois and Missouri, and shipping the products to California. The evidence showed that Griesedieck had no further control, responsibility, or title over or in the products after they left its plants.

Such activity was manifestly interstate commerce.

"There [was] evidence that plaintiff was not distributing oil in California, that beginning with January, 1926, it had no stock of any kind on the coast, that it shipped only in carload lots, from Illinois, to customers here, to whom the goods were sold . . . The inference could fairly be drawn, from the evidence, that since the filing of the certificate of withdrawal from intrastate business, the plaintiff has been engaged wholly in interstate commerce."

Indian Oil Refining Co., Inc. v. Royal Oil Co., 102 Cal. App. 710, 715 (1929).

"The mere shipping of products into the forum in interstate commerce does not constitute doing business in the forum. Cannon Mfg. Co. v. Cudahy Packing Co., *supra,* even if the plaintiff seeking to establish jurisdiction is the vendee and the action relates to the products sold. (Emery v. Adams, 6 Cir., 179 F. 2d 586.)"

Favell-Utley Realty Co. v. Harbor Plywood Corp., 94 F. Supp. 96, 99 (D. Ct., N. D. Calif., 1950).

See also,

Dahnke-Walker Mill Co. v. Bondurant, 257 U. S. 282, 290, 66 L. Ed. 239, 243, 42 S. Ct. 106 (1938).

B. California Statutes Permit Service of Summons and Complaint Upon Foreign Corporations by Service on the Secretary of State Only When the Foreign Corporation Is Doing Intrastate Business in California.

The conditions under which California statutes permit service of summons upon foreign corporations are contained in Section 6501 of the Corporations Code of the State of California.

Section 6501 provides:

> "If the agent designated for the service of process be a natural person and cannot be found with due diligence at the address stated in the designation or if such agent be a corporation and no person can be found with due diligence to whom the delivery authorized by Section 6500 may be made for the purpose of delivery to such corporate agent, or if the agent designated is no longer authorized to act, or if no agent has been designated and if no one of the officers or agents of the corporation specified in Section 6500 can be found after diligent search and it is so shown by affidavit to the satisfaction of the court or judge, then the court or judge may make an order that service be made by personal delivery to the Secretary of State or to an assistant or deputy secretary of state of two copies of the process together with two copies of the order, except that if the corporation to be served has not filed the statement required to be filed by Section 6403 then only one copy of the process and order need be delivered but the order shall include and set forth an address to which such process shall be sent by the Secretary of State."

These conditions, found in Section 6501 of Part II of Chapter 4, are, however, expressly made inapplicable to corporations engaged solely in *interstate* commerce by Section 6300, also in Part II. Section 6300 provides:

> "This part does not apply to corporations engaged solely in interstate or foreign commerce."

Appellee Griesedieck does not assert that California could not, within the limits of due process, provide for such service on foreign corporations; but it does assert that the State has not done so, that the state has set

the outside limits of such service *within* the limits of due process, and has set those outside limits on corporations doing an intrastate business.

No California cases have been found which have discussed this section, and it would appear that those cases which contain language to the effect that it is immaterial whether the business of the corporation in the state in *inter* or *intra*state in character, are to that extent questionable. (See, *Fielding v. Superior Court,* 111 Cal. App. 2d 490, 496 (hear. den. 1952); *Jeter v. Austin Trailer Equipment Co.,* 122 Cal. App. 2d 376, 381 (hear. den. 1954).)

In the *Fielding* case, *supra,* the Court said that such a distinction poses only the question of a burden upon commerce.

This view of the distinction would be correct, were it not for the fact of the existence of the section.

For had it been the intent of the legislators merely to restate the constitutional prohibition against burdening interstate commerce the section would amount to a mere redundancy.

Moreover, it would have been but a simple exercise in statutory drafting to have restated this prohibition, had that been the intent, rather than use the language appearing in the section.

The cases which question the distinction, moreover, may be distinguished on the ground that due to the nature of the relationship of the foreign corporations to the State of California in those cases, and the character of activities carried on therein, that under the broad rule of *International Shoe Company v. Washington,* 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945), where the concept

of intrastate business was broadened, the defendants there were doing an intrastate business. (See *Bomze v. Nardis Sportswear,* 165 F. 2d 33 (2d Cir., 1948).)

That the Corporations Code affirmatively requires a corporation to be engaged in intrastate business in California before service can be effected upon it by serving the Secretary of State is apparent from Section 6504 of the Corporations Code, when construed with Section 6300.

Section 6504 provides:

> "A foreign corporation *which has transacted intrastate business in this state* and has thereafter withdrawn from business in this state may be served with process in the manner provided in this chapter in any action brought in this state arising out of such business, whether or not it has ever complied with the requirements of Chapter 3 of this part." (Emphasis ours.)

If a corporation doing only interstate business within the State may be served by service of process on the Secretary of State, and if, in addition, a corporation which subsequent to withdrawal from intrastate business can be served in the same manner, then there is no distinction between the two situations and the presence of the qualifying clause in Section 6504 would be meaningless. In other words, if in both types of situations the foreign corporation may be served, then the fact of withdrawal would seem to have no significance; but the fact of withdrawal from intrastate business assumes significance and consistency with Section 6300 if the language was meant to exempt the withdrawing company which was thereafter engaged solely in interstate business.

C. California Cases Have Recognized the Distinction.

Several California cases, as noted above, have professed to find no basis in the distinction other than the question of burdening commerce. As noted, under the facts of those cases, they must be construed in the light of the *International Shoe* case as broadening the base of intrastate activities.

Nevertheless several California cases have recognized the importance of the distinction in that intrastate activities provide the basis of jurisdiction.

Thus, in *Oro Navigation Co. v. Superior Court,* 82 Cal. App. 2d 884, 888 (hear. den. 1948), the Court said:

> "The fact that the Triumph Company had *transacted intrastate business was the factual ground* upon which it was decided that service of plaintiff's summons in that action on the designated California agent, the Secretary of State, was a valid service." (Emphasis ours.)

Again, in *Proctor & Schwartz v. Superior Court,* 99 Cal. App. 2d 376, 381-382 (1950), the Court issued a peremptory writ of mandate directing the trial court to set aside its order denying the motion to quash service of summons on a foreign corporation by service on the Secretary of State. The Court set forth the facts of the manner in which the foreign corporation was operating and said:

> "The affidavit states, further, that at no time mentioned in the affidavit did the corporation maintain a sales force, or any salesmen, in California, and at no times therein mentioned could any employee or representative of said corporation in California collect money; that the purchase price for all ma-

chinery sold in California was received by the corporation in Philadelphia; that it maintained no bank account in California; that all statements and invoices sent to the purchaser in California were sent from Philadelphia; that no credit was extended to a purchaser in California on behalf of the corporation by any person in California and that it borrowed no money in California. The affidavit concludes: 'That affiant is informed and believes, and therefore states, that at all times herein mentioned said corporation was not engaged in doing business in . . . California and was not engaged in doing an intrastate business in . . . California; that it did not enter into any contracts in . . . California and did not deliver and install machinery in the factory of said Consolidated Chemical Industries, Inc., in the County of San Mateo, State of California, or otherwise.'

* * * * * * * *

"The presence of Crouse in Consolidated's plant was in pursuance of the contract, which contract unquestionably constituted a transaction in *interstate* commerce. (*Charlton Silk Co. v. Jones,* 190 Cal. 341 (212 P. 203); *W. W. Kimball Co. v. Read,* 43 Cal. App. 342, 345 (185 P. 192); *Indian Refining Co. v. Royal Oil Co., Inc.,* 102 Cal. App. 710, 714, 716 (283 P. 856).)" (Emphasis ours.)

The evidence shows, and the District Court found, that Griesedieck was engaged solely in interstate business in California, and as the California statute affirmatively prohibits service on the Secretary of State in an action against such a corporation, the Order of the District Court must be affirmed.

II.

California Statutes Permit Service of Summons and Complaint on Foreign Corporations Which Have Withdrawn From the State Only When Such Corporations Were Formerly Doing Intrastate Business.

If this Court follows the California statute on service upon foreign corporations, Section 3600 would preclude the service attempted here.

But even if Section 3600 did not so preclude the service of process in this case, California permits service on the Secretary of State where the corporation has withdrawn from business in California only in those cases where the corporation was formerly engaged in *intra*state business. (*Cal. Corp. Code,* Sec. 6504, *supra.*)

As has been shown in our Statement of the Case, Griesedieck sold its brewing assets, equipment, real estate, plants, and inventory on November 1, 1954, prior to the filing of the complaint, and since that date has not engaged in the brewing business, and has not engaged in business *of any kind* with respect to California.

Thus, Griesedieck having ceased to do any business in California prior to the service of process, as pointed out above, the California statute does not permit service such as was attempted here, but permits it only as to corporations formerly engaged in *intra*state business.

This is pointed out in 5 Stanford L. Rev. 503, 510, in an article entitled *"Suing Foreign Corporations in California"* where it is stated:

> "But perhaps this foreign corporation engaged solely in interstate commerce ceased doing business here before it was served with court process. Can it avoid suit in this manner? Apparently it can,

since the California statutes provide for service only on withdrawn corporations which have transacted *intrastate* business. This requirement is even more strict than might appear, since the transaction of intrastate business is defined by statute (California Corporations Code, Section 6203) as 'entering into repeated and successive transactions of its business in this state, other than interstate or foreign commerce.' "

Hence, even if Section 6300 be held not to be a bar to this service, as Griesedieck was conducting only interstate business within the state, and as it had withdrawn completely before service of process, the attempted service was not valid under California statutes, and the Order of the District Court must be affirmed.

III.

Even If Sections 6300 and 6504 Do Not Constitute a Bar to This Service of Summons and Complaint, California Requires Much More Contact With the State to Find a Foreign Corporation Is "Doing Business" Than Griesedieck Had Here.

A. Under the California "Doing Business" Requirement the Test Is Not Whether There Is Any Contact, but Whether or Not the Combination of Local Activities—Considering Their Manner, Extent, and Character—Is Sufficient to Support a Finding of "Doing Business."

It is a fundamental and undisputed requisite under the United States Constitution that before a state can authorize service of process upon the statutory agent of a foreign corporation and thereby acquire jurisdiction over that foreign corporation, the corporation must be "doing business" within the state. (*Riverside etc. Mills v. Menefee,* 237 U. S. 189, 35 S. Ct. 579, 59 L. Ed. 910; *West Publishing Co. v. Superior Court,* 20 Cal. 2d 720 (1942).)

In the application of the "doing business" test in California, it is clear that just *any* activity or conduct within the state by the foreign corporation will not, of itself, be sufficient to satisfy this requirement. (*West Publishing Co. v. Superior Court, supra.*)

The California Supreme Court, in the *West Publishing Company* case, set forth the approach to such cases as follows:

> ". . . it is the combination of local activities conducted by such foreign corporation—their manner, extent and character—which becomes determinative of the jurisdictional question." (*Id.,* p. 728.)

B. California Demands More Contact Than the Appellee Griesedieck Had in the State Before the "Doing Business" Jurisdictional Requirement Is Satisfied.

Appellants appear to have two theories which they assert are sufficient to show that Griesedieck was "doing business" under the California decisions.

The first of appellants' theories is that while Mr. Jones was in California he "solicited" orders for Griesedieck. And the second theory is that Griesedieck was doing business in California because the plaintiffs, on their own part and without authority, did certain acts which sound of agency.

On neither theory can Griesedieck be said to have been doing business in California.

Evidence adduced before the District Court showed that Griesedieck merely sold its products to two distributors in California, the contracts being accepted in Illinois and Missouri. Thereafter the products were delivered to a common carrier, at which point title passed to the plaintiff's and to the other distributor.

The same procedure was followed with regard to advertising material furnished the plaintiffs by Griesedieck. Following its delivery to the carrier, the manner and extent of, and responsibility for, its use rested solely on the plaintiff's discretion.

Aside from the sale of its products to independent distributors in California, the only contact Griesedieck had with California over the period involved was made in the four visits of Mr. Edward Jones, then president of Griesedieck.

Taking first those cases relied upon by the appellants, and in which the foreign corporation was held to be doing business in California, it is readily apparent that they require a great deal more contact with the forum than that presented here in order to make service upon a foreign corporation by serving the Secretary of State effective.

In *Jeter v. Austin Trailer Equipment Co.,* 122 Cal. App. 2d 376, 388-389 (hear. den. 1954), the foreign corporation (1) had an agent in the state who solicited continuously and systematically; (2) kept merchandise in California; (3) filled orders from local stocks; and (4) contributed to payment of local agent's rental; and though the corporation tried to remove itself by altering some of these factors, it was still retaining the local agent who solicited continuously and systematically.

In the case at bar Griesedieck (1) did not have an agent in the state; (2) did not keep merchandise in California; (3) did not fill orders from local stock; and (4) did not contribute to payment of its distributor's rental or to any of the expenses of its distributor. [Tr. pp. 29-30.]

In *Liquid Veneer Corp. v. Smuckler,* 90 F. 2d 196, 200 (C. C. A. 9th, 1937), the foreign corporation (1) shipped merchandise in bulk into California and warehoused it in California for present and future use in filling orders; (2) filled orders in California from warehoused stock.

In the case at bar Griesedieck (1) did not ship merchandise to California in bulk except as to fill orders from independent distributors, and did not warehouse any of its products in California for use in filling orders; (2) did not fill California orders from stock warehoused in California. [Tr. pp. 29-30.]

In *Thew Shovel Co. v. Superior Court,* 35 Cal. App. 2d 183, 186 (1939), the foreign corporation (1) fixed prices; (2) approved all sales; (3) sold goods in California on consignment; (4) agreed to supply engineers to install equipment; and (5) required distributor to make weekly reports to the manufacturer.

In the case at bar Griesedieck (1) did not fix prices for sales in California; (2) did not approve any sales made by the independent distributors in California; (3) did not supply engineers or any other professional help to the distributor; and (4) did not require the distributor to make weekly or any other reports to it. [Tr. pp. 27-30.]

In *Sales Affiliates, Inc. v. Superior Court,* 96 Cal. App. 2d 134, 214 P. 2d 541 (1954), the foreign corporation (1) had a salesman who covered the western states soliciting and taking orders from wholesalers and jobbers; (2) required retail purchasers of its products to enter into a license agreement; (3) fixed the minimum prices to be charged under the license agreement; and (4) required the retail users of its products to covenant not

to use products which infringed on the corporation's patents.

In the case at bar Griesedieck (1) did not have salesmen or a salesman who solicited in California, or took orders in California from wholesalers and jobbers; (2) did not require retail purchasers of its products to enter into any kind of agreement with it; (3) did not fix minimum prices or fix prices in any manner; and (4) did not require covenants from retailers as to use of other products or as to any other matter whatsoever. [Tr. pp. 27-30.]

In *Fielding v. Superior Court,* 111 Cal. App. 2d 490, 244 P. 2d 968 (1952), the foreign corporation (1) retained title to the goods shipped to California until the goods were sold; (2) warehoused the goods in California; (3) set the prices on the ultimate sales; (4) required reports of stock on hand each month; and (5) agreed to insure the distributor against any action on behalf of the Federal Government under the Food, Drug, and Cosmetic Act.

In the case at bar Griesedieck (1)did not retain title to goods shipped to California; (2) did not warehouse goods in California; (3) did not set prices on ultimate sales; (4) did not require reports of stock on hand each month, or reports of any kind or nature whatsoever; and (5) did not agree to insure the distributor against actions brought against it. [Tr. pp. 27-30.]

In *Duraladd Products Corp. v. Superior Court,* 134 Cal. App. ..... (134 A. C. A. 266, 1955), the foreign corporation (1) set up a distributor who participated in the final stages of manufacture of the corporation's product, (2) continued to supply technical advice concerning

the stage of manufacturing in which the distributor participated, (3) supplied technical advice as to necessary retooling, and (4) agreed to make periodic visits to the state for the purpose of technical consultation.

In the case at bar none of these elements is present. Moreover, the distributor there held itself out as agent of the foreign corporation with the apparent consent and knowledge of the foreign corporation. Such is not the case here, as will be shown below.

On the other hand, in situations similar to the one at bar, California Courts have found the corporation not to be doing business in the state.

In *Martin Bros. Elec. Co. v. Superior Court,* 121 Cal. App. 2d 790 (1953), the foreign corporation offered affidavits showing that it maintained no office, warehouse, or stock of materials in California; that all persons and business establishments in California handling its products were independent of and had no financial interest in it; that the corporation had no interest in these or any other business establishments in California, and had no control whatsoever over any such establishments or persons.

The foreign corporation further showed by affidavits that the corporation shipped no merchandise to California on consignment or on any other basis whereby ownership would remain in the corporation; that all prices quoted were prices in effect at the factory in Cleveland and that all shipments to California or anywhere else were made at the factory to agents or carriers specified by the buyers of the merchandise.

The corporation further showed by affidavit that it had no salesmen living in California for at least two years and did no selling, purchasing, manufacturing, or

other business within California; that the corporation never designated an agent for service of process in California; and had no bank accounts therein, and no real or personal property within the state.

The Court, on these facts, granted a writ of prohibition to restrain further proceedings, and noted:

> "It has been held that a foreign corporation may be doing business within the state where products manufactured by the corporation are distributed and sold in the state, even though the distributors are independent. (*Kneeland v. Ethicon Suture Laboratories, Inc.,* 118 Cal. App. 2d 211 (257 P. 2d 727); *Fielding v. Superior Court,* 111 Cal. App. 2d 490, 494 (244 P. 2d 968); *Sales Affiliates, Inc. v. Superior Court,* 96 Cal. App. 2d 134 (214 P. 2d 541).) But we have found no case holding that these facts, standing alone, are sufficient to make the foreign corporation amenable to process in this state. In the Kneeland case it was established, among other things, that the corporation was engaged in its own sales promotion work in the state. In the Fielding case the corporation had agreed to insure the distributor against action on behalf of the federal government under the Food, Drug and Cosmetic Act and the corporation set the retail sales prices and required from the distributor a report of stock on hand each month. In the Sales Affiliates case the distributor operated through licensing agreements granted by the corporation and thereby controlled its activities."

In similar factual circumstances, the Court in *Estwing Manufacturing Co. v. Superior Court,* 128 Cal. App. 2d 259 (1954), granted a writ of prohibition to restrain further proceedings. The facts of that case are not even

so compelling as those here, for as the dissent pointed out, the foreign corporation there had a continuous and established relationship with the ultimate purchasers of its products, while Griesedieck did not.

We submit that the Martin and Estwing holdings are dispositive of the appellants' contentions in this case.

C. Griesedieck Did Not Solicit Orders in California.

Appellants assert that Griesedieck's president, "on numerous occasions" was sent to California "to conduct sales tours throughout the state," and that he "personally solicited business for said appellee company."

Such broadly inaccurate statements appear throughout appellants' brief, as is noted in the Statement of the Case, but those noted above assume added importance in view of the "solicitation" theory by which appellants seek to bring Griesedieck within the jurisdiction of California Courts.

The evidence before the District Court clearly indicated that over the five year period during which the plaintiffs bought and distributed Griesedieck's products, Mr. Edward Jones, then president of Griesedieck, came to California on but four occasions. [Tr. p. 123.]

The purpose of these trips, as the evidence before the District Court showed, was not to make "sales tours," but they were made at the behest and suggestion of Mr. William R. LeVecke as a benefit to the plaintiffs' independent business as distributor. [Tr. p. 123.]

The various business calls described in the affidavits of William R. LeVecke, and redescribed in the plaintiffs' statement of "Facts," were made at the plaintiffs' own request as a means of promoting their good will with

their customers. [Tr. p. 124.] The president of Griesedieck did not solicit any orders for sales of beer in California, nor did he make any sales of beer in California. [Tr. p. 124.]

It is thus seen that the acts which appellants rely upon for their solicitation theory were not solicitations at all, or at least in the sense in which the California cases have used the term.

Solicitation, under the California cases which have discussed such activity, means *continuous* and *systematic* activity in actually soliciting orders (*Jeter v. Austin Trailer Equipment Co.,* 122 Cal. App. 2d 388; *Sales Affiliate, Inc. v. Superior Court,* 96 Cal. App. 2d 134 (1954); the term does not in any sense comprehend the activities of Mr. Jones.

The appellants' theory of solicitation, indeed, is analogous to and of the same fallacious character as its theory of agency, dealt with below, to the effect that the acts of the appellants in soliciting business for and improving the condition of their own independent distributorship, by reason of the fact that Mr. Jones accompanied Mr. LeVecke in visting LeVecke's customers, constituted solicitation on the part of Griesedieck simply because Griesedieck would benefit if LeVecke's sales were improved.

Since Edward Jones did not solicit business, and since his activity, such as it was, was not continuous and systematic, the appellants' theory of gaining jurisdiction here by reason of solicitation of business must fail.

As the Court in the *Fielding* case conceded:

> "It is true that the few isolated trips to this state by the representative of the corporations are not

sufficient to give the court jurisdiction. (*Proctor & Schwartz, Inc. v. Superior Court,* 99 Cal. App. 2d 376 (221 P. 2d 972).)"

Fielding v. Superior Court, 111 Cal. App. 2d 490, 495.

1. Even if Jones had Solicited Business, his acts were not such as to Constitute Doing Business Under the California Cases, Which have Never held that Solicitation Alone is Sufficient.

There is. of course, language in the California cases to the effect that solicitation, without more, is sufficient to constitute doing business in the state.

But analysis of the cases indicates that such language is not the holding in those cases, and that the Courts require *something more* than mere solicitation.

Thus, appellants cite *Koninklijke Luchtvaart Maatschappij v. Superior Court,* 107 Cal. App. 2d 495, 237 P. 2d 297 (1951), and quote the following language from that opinion:

> "In the more recent decisions, solicitation, *without more,* constitutes 'doing business' within a state when the solicitation is a regular, continuous and substantial course of business." (Appellants' emphasis; *Id.,* p. 500.)

However, the facts and the rule of that case require that something additional be shown.

In the *Koninklijke* case the corporation had two offices within California, in one of which it had three or four employees constantly engaged in the solicitation of business and still so engaged at the time the action was brought. In the other office, which had been continu-

ously maintained since 1938, the corporation employed some 24 persons who administered contracts of purchase, which purchases were in excess of $1,000,000.00 annually. The corporation furthermore maintained a bank account in the state and owned automobiles within the state.

The *Koninklijke* case, therefore, does not support the asserted rule.

Furthermore, the cases cited by the *Koninklijke* case as supporting the rule (*Frene v. Louisville Cement Co.,* 134 F. 2d 511, 146 A. L. R. 926; *Perkins v. Louisville & N. R. Co.,* 94 Fed. Supp. 946 (D. C., Dist. Col., 1951), do not do so.

In the *Frene* case the Court had the following to say:

> "But it is not necessary to take the final step in repudiation (of the solicitation *plus* rule) in this case, since the facts are sufficient to bring it within the 'solicitation plus' rule. Lovewell's activities on behalf of defendant were not limited to 'mere solicitation' . . . he did more, did it regularly, and did it with defendant's knowledge, consent and approval. He not only solicited and forwarded orders. He visited the jobs where defendant's product was being used, made suggestions for solving difficulties which arose in its use, received complaints, forwarded them to the home office and, while he had no authority to make final settlements or contractual adjustments, aided generally both in preventing and in clearing up misunderstandings and difficulties . . . Lovewell testified that in some instances defendant expressly instructed him to visit specific jobs where its product was being used and to assist in straightening out whatever complications had arisen or might arise. Apparently this happened repeatedly and Love-

well considered this work a part of his employment when he was so instructed."

The *Frene* case thus expressly states that it was not repudiating the 'solicitation plus' rule, and the facts bear out that statement.

In the *Perkins* case, also cited by the *Koninklijke* opinion and by appellants for the same proposition, we find the following language:

> ". . . it is the view of this court that under California law the *continued solicitation* of business by a *foreign corporation maintaining a regular office within this state constitutes doing business* and renders the foreign corporation present in the state of California and amenable to its process." (Emphasis ours.)
>
> *Perkins v. Louisville & N. R. Co.,* 94 Fed. Supp. 946, 949.

In neither case therefore was the rule expressed that solicitation *without more* constitutes doing business in the forum.

Appellants cite *Jeter v. Austin Trailer Equipment Co.,* 122 Cal. App. 2d 276, 265 P. 2d 130 (1953), as supporting the rule. There, however, the solicitation activities of the corporation's employee were regular, continuous, and persistent, which might support the asserted rule when rendered with those qualifications, but would not support it here where the alleged solicitation was merely casual and extremely intermittent.

Moreover, in the *Jeter* case it was shown that the corporation had only recently warehoused its merchandise in California, filled orders from its local stocks, and contributed to the agent's rental.

Appellants appear to cite *Woodworkers Tool Works v. Byrne,* 191 F. 2d 667 and 202 F. 2d 530 (1951), as supporting the rule, but that case does not discuss solicitation at all.

D. Griesedieck Was Not Doing Business in California by Reason of the Acts of the Levecke Company or of the Leveckes in Holding Themselves Out as Agents.

It is significant that in this case, unlike any case cited by appellants, it is not a third party which is suing the foreign corporation and maintaining that it was doing business within the state because it had agents or activities there.

Here it is the purported agent himself who asserts that because he did certain acts, holding himself out as agent and employee, that the foreign corporation was doing business there.

The essence of appellants' case in this regard is that by sending out business cards, which they say "showed the name of appellants *as agents of Griesedieck*" (App. Br. p. 5), and by their own acts of signing correspondence *as agents of Griesedieck,* and their own act of listing Griesedieck in the telephone directories, and their own acts of advertising and soliciting orders for Griesedieck products, they thereby brought Griesedieck within the State.

The evidence shows, in spite of appellants' bland assertion that the business cards "showed the name of appellants as agents of said appellee company," that such cards were shipped to the appellants *void* of printing except for the colored trademarks. By their own unauthorized act of printing Griesedieck's name upon the cards, appel-

lants assert that they may bring Griesedieck into California.

The evidence shows, in spite of appellants' irrelevant assertion that they signed stationery as agents and employees of appellee Griesedieck, that they were not so authorized to use any stationery shipped to them, and that such stationery as was shipped to them was at their request, and done without the knowledge or authority of responsible officers of Griesedieck. By their own request for stationery, and by their own unauthorized acts of signing said stationery as agents and employees of Griesedieck, appellants assert that they may bring Griesedieck into California.

The evidence shows, in spite of appellants' continued assertion in the affidavits and in their brief that Griesedieck shipped them sales delivery books and required them to be used on California sales, that such delivery books as were shipped were shipped at the request of appellants in order to provide a form for their own delivery books, that such delivery books as were shipped could only, as a strictly practical matter, be used in Missouri. For the books show on their face that that was the state of their intended use, there being provided thereon a section for the insertion of the Missouri liquor license number of the purchaser.

The evidence shows, in spite of appellants' continued assertion that such use was required by Griesedieck, that Griesedieck did not require such use, and did not even know that such use of the books was being made, if, indeed, it was, it being extremely unlikely that a California seller of beer would make deliveries on forms which contain a blank for the entry of a *Missouri* liquor license

number. Thus, by their own unauthorized acts of using such delivery books, appellants assert that they may bring Griesedieck into California.

Thus, in essence, appellants argument here is that they may literally lift themselves into Court by their own bootstraps, for since *they* have done these acts within the state, *ipso facto* the corporation has done them, and that therefore the corporation is within the state.

The adoption of such a rule would create obvious opportunities for injustice, and would permit any business in California to bring in a foreign corporation which had had any dealings with it. We submit that the asserted rule is against the policy of the statutes and the Courts, and is contrary to law.

In *Jameson v. Simonds Saw Co.,* 2 Cal. App. 582 (1906), where the Simonds Saw Company was a California corporation and the co-defendant, Simonds Manufacturing Company, was a Massachusetts corporation, the plaintiff brought an action in California for services rendered. The plaintiff there made an attempt similar to that of appellants' here to show jurisdiction by showing that the California corporation had printed on its stationery the name of the foreign corporation. The Court, at pages 578-588, had the following to say:

> "Another fact relied on by the plaintiff was that certain letterheads of the Simonds Saw Company were introduced in evidence, upon which was printed a list of articles of different manufactures in which it dealt, and underneath the name of the appellant was the word 'Agencies,' beneath which there were

printed several places of address in different states, the last of which was 'Simonds Saw Company, San Francisco, Cal.'

"The printing and use of these letterheads was the act of the Simonds Saw Company, and not of the appellant. The saw company could not thus constitute itself the agent of the appellant, nor would the knowledge of the appellant that it had so styled itself make the saw company its agent, or, in the absence of any showing that it had acted as such agent with its approval or assent, be the transaction of any business by the appellant. It is a matter of common knowledge that frequently the manufacturer of articles gives to some person or firm the exclusive right to sell such article within a designated territory, and that such person or firm styles itself the exclusive agent for the sale of such article. *The goods thus dealt in by the agent are purchased by him from the manufacturer, but the manufacturer is not doing business within that territory by reason of the sale of its wares by such self-styled exclusive agent."* (Emphasis ours.)

Since in the *Simonds* case it was a third person who attempted to bring the foreign corporation into the state by reason of the unauthorized acts of the purported agent, the case at bar presents even stronger facts, for it is here the "self-styled exclusive agent" himself to assert the presence of the corporation.

This rule of the *Simonds* case has been followed as recently as *Smith & Wesson, Inc. v. Municipal Court,* 136 A. C. A. 757, 763 (1955), and is dispositive of the appellants' contentions.

Since appellants' entire case is based upon these fallacious theories of agency and solicitation, which themselves are based upon conflicting evidence, the District Court must be affirmed unless its ruling was clearly erroneous.

United States v. Comstock Extension Mining Co., Inc., 214 F. 2d 400, 403 (9th Cir., 1954).

E. The So-Called "Substantial Benefits" Rule Is Not the Test of Jurisdiction.

Appellants assert, following some dictum in a few of the California cases that if the representation which a foreign corporation maintains in this state gives it substantially the same benefits it would enjoy by operating through its own office or paid sales force that it is "doing business" in the state.

Appellant relies upon:

Sales Affiliates v. Superior Court, 96 Cal. App. 2d 134, 214 P. 2d 541 (1950);

Fielding v. Superior Court, 111 Cal. App. 2d 490, 244 P. 2d 968 (1952);

Iowa Manufacturing Co. v. Superior Court, 112 Cal. App. 2d 503, 246 P. 2d 681 (1952);

Jeter v. Austin Trailer Equipment Co., 122 Cal. App. 2d 376, 265 P. 2d 130 (1953).

In all of these cases, as has already been noted, the corporation carried on substantial, continuous activities in the state, and the asserted rule is nothing more than dicta.

The fault of this test, aside from the fact that the California Supreme Court has never used it, is that it proves too much.

For example, a foreign corporation which had no contacts whatever in the State of California, and which sold its products in interstate commerce to a California concern which thereafter aggressively engaged in selling on their own part those products, obviously would be receiving substantially the same benefits as if "it maintained its own office or paid sales force" within the state.

But the cold fact remains that the foreign corporation could not be said to be present within the state. The same reasoning applies in the case at bar, and the asserted rule does not aid the appellants under the facts of this case.

IV.

Griesedieck Would Be Denied Due Process Were It Forced Under the Circumstances of This Case to Defend the Action in California.

A. Due Process Must Be Assessed Independently of the "Doing Business" Test.

Assuming, *arguendo,* that the California statutes permit the service attempted here, then, should Griesedieck be held to have been doing business in California, such a finding would be violative of due process.

For in spite of the language in some of the lower court decisions in California (see *Fielding v. Superior Court,* 111 Cal. App. 2d 490, 496, 240 P. 2d 968 (cert den. 344 U. S. 897, 1952)), the requirements of due process must be met independently of the "doing business" test.

> *Schmidt v. Esquire,* 210 F. 2d 908, 915 (7th Cir., 1954).

B. Due Process Requires an Estimate of the Inconveniences to the Corporation If Forced to Defend Away From Its Home.

The requirements of due process in situations where an *in personam* judgment is sought against a foreign corporation were set out by the United States Supreme Court in *International Shoe Co. v. Washington,* 326 U. S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95, 102 (1945), where the court said:

> "(D)ue process requires . . . (that) he have certain minimum contacts with (the territory of the forum) such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "

Under this approach:

> "An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' is relevant in this connection. (Hutchinson v. Chase & Gilbert, *supra.*"
>
> *International Shoe Company v. Washington, supra,* at p. 317.

Hutchinson v. Chase & Gilbert, 45 F. 2d 139 (C. C. A. 2d, 1930), did not discuss due process, but was cited and apparently adopted by the court in *International Shoe* in its discussion of due process requirements. In the *Hutchinson* case a foreign corporation was sued in a New York State court. The defendant removed for diversity of citizenship and moved to set aside the service because it was not doing business within the state.

After a review of the contacts which the corporation had with New York, the Court of Appeals for the Second Circuit, in an opinion by Judge Learned Hand, said:

> "There must be some continuous dealings in the state of the forum; enough to demand a trial away from its home.
>
> "This last appears to us to be really the controlling consideration, expressed shortly by the word 'presence,' but involving an estimate of the inconveniences which would result from requiring it to defend, where it has been sued. We are to inquire whether the extent and continuity of what it has done in the state makes it reasonable to bring it before one of its courts . . . In the end there is nothing more to be said than that all the defendant's local activities, taken together, do not make it reasonable to impose such a burden upon it. It is fairer that the plaintiff should go to Boston, than that the defendant should come here."

Due process, then, involves consideration of inconvenience to the corporation, which consideration would seem to be analogous to, if not the same, as, that made in a motion to change venue.

In this approach consideration of such factors as the relative ease of access to sources of proof, availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses should be made.

It is manifest that the defendant would be put to great expense should it be forced to defend the action in California.

The Griesedieck Western Brewery Company is no longer in existence; the company which succeeded it no longer engaged in the brewing business. Some of its employees, such as the former president, Mr. Edward Jones, are no longer connected with the succeeding organization. The corporate records which would have to be used in defending the action are not in California. The corporate officials and employees who would have to testify are not in California.

That it would be unfair and inconvenient to the corporation to disrupt its activities by bringing its officials to California to testify, that it would be unfair and unjust to force it to undergo the cost of bringing witnesses to California is only too obvious.

That it would pose problems of great difficulty for Griesedieck in securing attendance of witnesses—persons no longer connected with the corporation who for business or other reasons might well be reluctant to voluntarily come to California from St. Louis—is readily apparent.

On the other hand it is fair and reasonable, in view of the insubstantial contacts which Griesedieck had with California, that the plaintiff should go to the place where the defendant is to be found, to the place where the defendant's documents exist, and where plaintiff's witnesses are readily available and easily served with process.

In short, in the words of Judge Learned Hand, "It is fairer that plaintiffs should go to (St. Louis) than that the defendant should come here."

V.

In Removing the Action to the District Court, Appellees Did Not Waive Jurisdiction.

Appellants, in Specification of Errors, Number 4, assert that in removing the action from the Superior Court of California to the United States District Court the appellees waived the question of jurisdiction.

Appellants cite no authority for this proposition and do not even discuss it in their argument, apparently abandoning the point, or realizing the fallacy it states.

The proposition has been repeatedly rejected by the courts. In *Block v. Block,* 196 F. 2d 930, 932, 933 (7th Cir., 1952), it is said:

> "Defendant followed the statutory mode for removal by filing his certified petition therefor, with copy of the alleged process and the complaint attached thereto, and the requisite bond, all as provided by 28 U. S. C. A. §1446. It then became necessary for the District Court to examine his motion to dismiss for want of jurisdiction over the subject matter of the suit . . . His application for removal did not constitute a waiver of service. General Investment Co. v. Lake Shore & M. S. Ry. Co., 260 U. S. 261, 268, 43 S. Ct. 106, 67 L. ed. 244."

See also:

Hassler v. Shaw, 271 U. S. 195, 46 S. Ct. 479, 70 L. Ed. 900;

Wabash Western R. v. Brow, 164 U. S. 271, 279, 17 S. Ct. 126, 41 L. Ed. 431, 434.

Appellants' assertion is obviously contrary to the law and is of no avail to them here.

VI.

(CARLING BREWING COMPANY, INCORPORATED)

California Has Not Exercised Jurisdiction Over Foreign Corporations Where the Cause of Action Sued Upon Arose Out of the State and Is Unrelated to the Business Done Within the State.

Carling Brewing Company was engaged only in interstate business in California, and in the course of such business had no contacts or relationships with the plaintiffs.

The alleged liability sued upon by the appellants arose from an out-of-state act—the acquisition of Griesedieck's assets by Carling—and was entirely unrelated to those activities which Carling maintained in California.

That a state *may* exercise jurisdiction over foreign corporations in actions arising out of the state does not mean that the state has done so, or even that it must.

> *Partin v. Michaels Art Bronze Co.*, 202 F. 2d 541 (3rd Cir., 1953).

Thus, the fact that the United States Supreme Court, in *Perkins v. Benguet Consolidated Mining Co.*, 342 U. S. 437, 72 S. Ct. 413, 96 L. Ed. 485 (1952), held that due process will *permit* such an assertion, does not mean that California courts can exercise that jurisdiction unless the legislature has given them power to do so. For the *Perkins* case was remanded to the state court for a determination of whether the law of the forum provided for the exercise of that jurisdiction.

See also:

Dunn v. Cedar Rapids Engineering Co., 152 F. 2d 733 (C. C. A. 9th, 1946);

Partin v. Michaels Art Bronze Co., 202 F. 2d 541 (3rd Cir., 1953);

Jenkins v. Dell Publishing Co., 130 Fed. Supp. 104, 106 (D. C., W. D. Pa., 1955).

This requirement is pointed out in the *Partin* case, *supra,* as follows:

"This requirement that the state provide for the exercise of jurisdiction in a particular set of circumstances is emphasized by the language of Restatement, Judgments, Sections 22 and 23. Section 22 provides:

" 'A court by proper service of process may acquire jurisdiction over an individual not domiciled within the State who carried on a business in the State, as to causes of action arising out of the business done in the State, *if a statute of the State so provides,* at the time when the cause of action arises.' (Emphasis ours.)

"Section 23 provides:

" 'A court by proper service of process may acquire jurisdiction over an individual not domiciled within the State who does acts or owns things in a State which are of a sort dangerous to life or property, as to causes of action arising out of such acts or ownership, *if a statute of the State so provides* at the time when the cause of action arises.' (Emphasis ours.)

"And Comment a. following Section 23 says:

" 'The rule stated in this Section is not applicable if at the time when the cause of action arose there

> was no statute in the State providing for the acquiring of jurisdiction over the defendant.' "

The California Legislature has never given the courts power to exercise this jurisdiction.

This court had occasion in *Dunn v. Cedar Rapids Engineering Co.,* 152 F. 2d 733 (C. C. A. 9th, 1946), to pass upon the question of whether California had exercised jurisdiction over a foreign corporation for a claim arising outside the state.

The order of the trial court quashing the service of summons and dismissing the action was affirmed by the Court of Appeals wherein that court said at 152 F. 2d 733, 734:

> "It does not appear that authorization for California State Courts to entertain the instant action can be read into the statute. Significantly, in Miner v. United Air Lines Transport Corp., D. C. Cal. 1936, 16 F. Supp. 930, 931, this view of the statute was taken as long ago as 1936 by the United States District Court, and no decision appears to have been made on the subject since by the California courts."

While in the *Dunn* case the service of process was upon a statutory as opposed to an actual agent that distinction is of no importance here.

The opinion of the California District Court of Appeal in *Koninklijke Luchtvaart Maatschappij v. Superior Court,* 107 Cal. App. 2d 495 (1952), does not meet this requirement, and the Supreme Court of California appears never to have passed directly on the question. The fact

that the California Supreme Court denied a hearing in the *Koninklijke* case does not constitute an approval of the case.

> "(T)he denial in any case . . . *is not to be taken as an expression of any opinion by this court,* or as the equivalent thereof, in regard to any matter of law involved in the case and not stated in the opinion of that court, *nor, indeed, as an affirmative approval by this court of the proposition of law laid down in such opinion.*"
>
> *People v. Davis,* 147 Cal. 346, 350, 81 Pac. 718 (1905) (Emphasis ours).

See also:

Bohn v. Bohn, 164 Cal. 532, 537, 129 Pac. 981 (1913);

Western Lithograph Co. v. State Board, 11 Cal. 2d 156, 167, 78 P. 2d 731 (1938);

In re Stevens, 197 Cal. 408, 423, 241 Pac. 88 (1925).

Since the California legislature has not provided for the exercise of jurisdiction by the California courts where the cause of action arose out of the state and is unrelated to the business carried on in the state by the foreign corporation, the District Court was correct in making its order and must be affirmed.

VII.

Under the Circumstances of This Case, Due Process Considerations of Unfairness and Unreasonable Burdens to the Corporation Require the Affirmance of the District Court.

A. Due Process Requires a Balancing of Inconvenience and Unfairness to the Corporation With Its Activities Carried on Within the State.

Assuming, *arguendo,* that California statutes permitted the exercise of jurisdiction over causes of action which arise outside of the State and are unrelated to the business carried on therein, still it must be shown that forcing Carling to defend this suit in California comports with due process.

The United States Supreme Court, in *International Shoe Co. v. Washington,* 326 U. S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945), as is shown in the Griesedieck argument, set out the minimum contacts and fairness rule. The court stated that the demands of due process might be met by:

> ". . . such contacts of the corporation with the state of the forum as to make it reasonable in the context of our federal system of government, to require the corporation to defend *the particular suit which is brought there.*" (Emphasis ours.)

Under the *International Shoe* decision and that of *Hutchinson v. Chase & Gilbert,* 45 F. 2d 139 (C. C. A. 2d, 1930), due process requires a balancing of the character of the suit brought, and its special facts, with the possible burden and inconveniences to be imposed upon the corporation.

In such a balancing the fact that the act sued upon arose outside of the state and was unrelated to the business carried on therein is critical.

This is apparent from the further language of the opinion in the *International Shoe* case where the court stated:

> "(The activities) resulted in a large volume of interstate business, in the course of which appellant received benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights. *The obligation which is here sued upon arose out of those very activities.*" (*Id.,* p. 320.) (Emphasis ours.)

It was evident, the court said, that those activities—which gave rise to the obligation sued upon—established sufficient contacts or ties with the forum to make it reasonable and just according to our notions of fair play and substantial justice to permit the suit.

The United States Supreme Court, in *Perkins v. Benguet Consolidated Mining Co.,* 342 U. S. 437, 72 S. Ct. 413, 96 L. Ed. 485 (1952), held that due process would *permit* a state to render an *in personam* judgment against a foreign corporation on a cause of action arising out of the state, but this came only after a consideration of the complex of activities carried on *within* the state.

> "It remains only to consider, in more detail, the issue of whether, as a matter of federal due process, the business done in Ohio by the respondent mining company was 'sufficiently substantial and of such a nature as to *permit* Ohio to entertain a cause of action against a foreign corporation, where the cause of action arose from activities entirely distinct from

> its activities in Ohio. See International Shoe Co. v. Washington, *supra* (326 U. S. at 318, 90 L. ed. 103, 66 S. Ct. 154, 151 A. L. R. 1057)." (*Id.*, p. 447.)

There the activities of the Benguet Company in Ohio were vastly more extensive than the very limited and entirely interstate business of Carling.

And *Koninklijke Luchtvaart Maatschappij v. Superior Court,* 107 Cal. App. 2d 495, is distinguished for the same reason, and entirely aside from the fact that this statement of law has never been rendered by the California Supreme Court.

Thus the *Perkins* case merely indicates that where the complex of activities carried on within the state by the foreign corporation is extensive enough, this will overbalance the inconvenience to the corporation under the due process balancing test.

California cases have recognized the importance of the relation of the cause of action to the state.

Thus, in *Boote's Hatcheries, etc. Co. v. Superior Court,* 91 Cal. App. 2d 526, 528 (1949), following and paraphrasing the opinion of the United States Supreme Court in the *International Shoe* case, the court said:

> "It is quite evident that the ennumerated activities of petitioner established sufficient contacts and ties in this state to make it reasonable and just according to our conception of fair play and substantial justice that the plaintiff Giebeler should be permitted to *enforce the obligations which petitioner has incurred in this state, and which constitute the basis for his action.*" (Emphasis ours.)

B. Carling's Limited Activity Within the State Does Not Justify Forcing It to Defend This Action in California.

It is pertinent to note that in the *Perkins* case the corporate officers, and presumably the corporate records, of the foreign corporation were in the forum where the suit was brought, and no inconvenience in this regard would be imposed upon the corporation.

In the case at bar, however, the testimony of Carling's top officials would be critical in the defense of the suit, and these officials are not in California, but in Ohio, and it is manifestly unfair to require that they come to California for defense of the suit.

There is the additional point, moreover, that Carling's defense is inevitably linked to and depends upon the testimony of Griesedieck's officials, and of other persons, such as Griesedieck's former president, Edward Jones, who are no longer connected with Griesedieck.

This is so because the plaintiffs have alleged that they had an oral contract with Griesedieck and that Carling assumed this contract. The terms of the alleged oral agreement, if it did exist, or its non-existence, if it did not exist, are all facts within the knowledge of, and could only be established by the testimony of, those present and former officials and employees of Griesedieck.

None of these persons would be subject to subpoena of the United States District Court in California. And none of these witnesses have any interest in Carling's defense so that they might voluntarily appear. This situa-

tion is aggravated by the fact that even should these persons be inclined to voluntarily appear for Carling, they still would be reluctant to do so in the circumstances of this case. For in so doing they would undertake the risk that the Griesedieck Company would be subject to the jurisdiction of the California courts by means of personal service made upon them as officials of Griesedieck present in California.

Carling, therefore, would be faced with a double burden in defending the action in California; the extreme inconvenience in bringing its corporate officials and records from Cleveland, Ohio, to Los Angeles, California, and the practical, if not actual, impossibility of securing the attendance of the very witnesses upon whose testimony its defense must rest.

Therefore, under the due process test of *International Shoe,* which considers inconvenience and unreasonable burdens to the corporation, the fact that (1) the alleged cause of action arose out of the state, (2) is brought by plaintiffs who had no contract, contact or dealings with the corporation, (3) this foreign cause of action does not even have a remote connection with the limited business of Carling in California, and (4) the corporation would be subjected to extreme inconvenience and would have the burden of defending the action without the attendance of witnesses upon whose testimony its defense depends, Carling would be denied due process if it were forced to defend the action in California.

It follows that the Order of the District Court must be affirmed.

Conclusion.

(1) California statutes do not permit service of summons and complaint upon the Secretary of State in the case of foreign corporations engaged solely in interstate business.

(2) California statutes do not permit service of summons and complaint upon the Secretary of State in the case of foreign corporations formerly engaged solely in interstate commerce but which have withdrawn from the state prior to the bringing of the action.

(3) The Griesedieck Company did not solicit orders or sales in California, nor accept orders or sales in California. Even if such acts as were done constituted solicitation, they were not such within the meaning of the California cases which require that solicitation be continuous and systematic. Nor were the plaintiffs ever the agents or employees of Griesedieck, and they cannot, as California law holds, make themselves such by reason of their own unauthorized acts of which Griesedieck had no knowledge.

(4) Griesedieck would be denied due process if forced to defend the action in California.

(5) Griesedieck and Carling did not waive the jurisdictional question by removing the action to the District Court.

(6) California has not exercised jurisdiction over foreign corporations where the cause of action sued upon

arose out of the state and bears no relation to the business done within the state.

(7) Carling would be denied due process if required to defend the action in California.

The action of the District Court was therefore correct and its order must be affirmed.

Respectfully submitted,

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Attorneys for Appellees.

No. 14816

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM LEVECKE and REED LEVECKE, doing business as THE LEVECKE COMPANY,

Appellants,

vs.

GRIESEDIECK WESTERN BREWERY CO., a corporation, and CARLING BREWING CO., a corporation,

Appellees.

APPELLANTS' REPLY BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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APPELLANTS' REPLY BRIEF.

Statement.

The appellees, in their brief, have discussed several questions of law which are not material to a determination of the issues on this appeal, and we shall not in this brief labor this situation. Stripped of the immaterial matters, the appellees' brief raises four questions:

(1) That the affidavits filed in the court below were in direct conflict and that therefore there can be no review of the matter on appeal;

(2) That the evidence does not show that the Griesedieck Western Brewery Co., now known as The Griesedieck Company, solicited business in the State of California;

(3) That the appellants, without the consent of the Griesedieck Western Brewery Co., held themselves out as the agents of the company;

(4) That the evidence of the activity of Carling Brewing Co. was not sufficient to show that it was doing business in the State of California.

Argument.

With reference to the question of conflict in the affidavits in the court below, the affidavit of William R. LeVecke showed the following, which was not denied by any affidavit filed by either Griesedieck Western Brewing Co. or by Carling Brewing Co., commencing at page 64 of the transcript of record:

That in October, 1951, Edward Jones came to California in order to increase the sales of defendant Griesedieck's beer products in this State. The first two days in Los Angeles, Mr. Jones spent in calling upon 40 to 50 supermarkets in the area. These consisted of Alexander Stores, Shopping Bag, Thriftymart and Safeway Stores. The following day Mr. Jones and Mr. LeVecke called on Certified Grocers, a large cooperative.

That Mr. Jones and Mr. LeVecke then went to San Francisco where Mr. Jones contacted Mr. Jack Eagan of the First California Company in an effort to make a contact with Lucky Stores in order to sell Lucky Stores the products of Griesedieck Western Brewery Co.; that in so doing they met Mr. Dardi of the Blair Holding Company who was also Chairman of the Lucky Stores, Incorporated; that at this meeting Mr. Jones attempted to sell his company's beer to the Lucky Stores; that later on the same day they called on Drexel Distributing Company, a subsidiary of Safeway.

In October of 1952, Mr. Jones again came to California. Upon his arrival he, together with Mr. LeVecke, called upon approximately 50 supermarkets that were handling the products of the defendant Griesedieck; that Mr. Jones showed the various managers of the stores called upon ways in which they could increase their sales of the Griesedieck products.

That Mr. Jones then called upon the buyers for Certified Grocers, Shopping Bag, Von's, Thriftymart and others; that he assured these buyers that the brewery was financially sound and showed them the brewer's financial statement, assured them that the beer was on the West Coast to stay and that this was not a fly-by-night operation.

That on this same trip Mr. Jones and Mr. LeVecke went to San Francisco where they called upon United Grocers which had just recently started selling the beer products of Griesedieck; that United Grocers is a large cooperative grocery organization similar to Certified; that Mr. Jones assured Mr. Sorenson, the President of United Grocers, that this was not a temporary setup and that Griesedieck was on the West Coast to stay. He gave Mr. Sorenson a copy of Griesedieck's financial statement.

That they again called upon the Drexel Distributing Company, thanked the President of that Company for past business and gave suggestions for increasing sales of Griesedieck products.

That they again called upon Mr. Eagan and Mr. Dardi in an effort to obtain the Lucky Stores business.

That in October of 1953, Mr. Jones came to California; that Mr. William R. LeVecke met Mr. Jones in Tucson where they started calling on the outlets handling

Stag and Hyde Park beer; that they then called on the Phoenix stores that were handling the products, including Safeway and Bayless Markets; that Mr. Jones delivered to Mr. Bayless a financial statement of the Griesedieck Western Brewery Co.; that following the canvassing of Tucson and Phoenix, they called on supermarkets in the Los Angeles area. Here Mr. Jones presented each manager of the store called upon with a mechanical pencil and discussed with them the sales of defendant's beer products.

The following day Mr. Jones and Mr. LeVecke called upon the buyers of the large chain stores handling the defendant's products in the Los Angeles area. Each buyer was given a Sterling silver opener by Mr. Jones. He called upon the Certified officials together with Mr. LeVecke and they too were presented with Sterling silver openers. Following this Mr. Jones and Mr. LeVecke called upon United Grocers and Safeway in San Francisco. Each official of each company were presented with a silver bottle opener. Mr. Jones and Mr. LeVecke then called upon the Lucky Stores and discussed with the officials of Lucky Stores the defendant's products.

That from 1950 to November 30, 1954, the defendant Griesedieck Western Brewing Co. kept a steady flow of its beer products coming into the State of California.

Not one of these allegations in the affidavit of Mr. William R. LeVecke were denied.

We then have the affidavit of Mr. Reed LeVecke which commences at page 71 of the transcript of record, attached to which commencing at page 75, is Exhibit "A."

On page 77 Mr. Jones points out to his California stockholders in speaking of his 1951 trip to California:

> "While there I called upon about 30 supermarkets with our distributor, Mr. William LeVecke, LeVecke Distributing Company, 1807 E. Olympic Blvd., Los Angeles, California."

and in the same letter on page 78 he says:

> "In the event Hyde Park '75' or Stag are not available in your area, won't you be good enough to telephone or write our distributor, Mr. LeVecke, and give him the name and address of the supermarket where you shop. He will promptly follow through and get that market to handle our beers. You can be of material help to your company by reporting such cases to Mr. LeVecke promptly."

And again on page 78 in a letter addressed to the Shopping Bag Stores, Mr. Jones points out to that company that Mr. LeVecke was the representative of the Griesedieck Western Brewery Co.:

> "I sincerely appreciate the time you gave our representative, Mr. William LeVecke, and myself on my recent visit to Los Angeles. It does a lot of good to exchange ideas with outstanding merchants like yourself. Mr. LeVecke and I called on approximately 20 of your stores and made a survey that was most comprehensive * * *."

In a letter to Mr. John L. Hamilton, Pacific Mercantile Company, 461 Market Street, San Francisco, Mr. Jones again holds out Mr. LeVecke as the representative of the Griesedieck Co:

> "Our representative, Mr. William LeVecke, reports getting our beers established in your good firm.

We are most appreciative of this and you may be sure that we at the brewery will follow this account and do everything we can at this end to give you good service and satisfaction."

On page 82 of the transcript, Mr. Jones writes to Mr. Lawrence R. Graefe, Bob's Market, Torrance, California, soliciting his business as follows:

"We recently learned through the Co-operator that you are one of the new members of the Certified Grocers Association.

We are one of the suppliers for Certified Chain and we enjoy exceptionally fine business from the Certified group. Our products are Stag beer and Hyde Park '75' beer.

Our representative is Mr. William LeVecke, 1807 East Olympic Boulevard, Los Angeles, California, telephone VanDyke 7944.

If you are not handling our products, a telephone call to Mr. LeVecke will be an easy way to get acquainted with our profitable line for distribution in your neighborhood."

Then Mr. Jones notes that the attached letter was sent to a group of people whose names appear on pages 82 and 83 of the transcript.

On page 84 of the transcript Mr. Jones' letter to the Safeway Stores, Inc., Phoenix, Arizona, appears in which Mr. Jones says:

"I sincerely appreciate the time you gave our representative, Mr. William LeVecke, and myself on our recent visit to Phoenix. It does us a lot of good to exchange ideas with outstanding merchants like yourself.

Mr. LeVecke and I called on 68 Safeway stores and made a survey that was most comprehensive, starting in Tucson and ending in San Francisco."

Again on page 85, Mr. Jones is urging the United Grocers in connection with the sale of Griesedieck products. He says:

"I should like to emphasize that we are on the Pacific Coast to stay, and as revealed in our financial statement that I gave to your Mr. Sorensen, you will believe me when I say that we are financially responsible to carry out our obligations to you and your dealers.

If you have any ideas as to how we may make our association more profitable and if you can suggest how it will function more smoothly, please command me."

On page 86 of the transcript, Mr. Jones is again soliciting business in a letter addressed to Mr. Henry J. Carthy, Los Angeles, California:

"It was a pleasure to meet you in Mr. Campbell Stewart's office the other day. I regret that I did not have more time to tell you about our company and our products. However, our Mr. LeVecke and the Certified group no doubt have acquainted you with our organization.

I would like to reiterate that we are on the Pacific Coast to stay, and if you will inspect our financial statement, you will find that we are financially responsible and that we can carry out our responsibility to your good organization."

On page 87 of the transcript, Mr. Jones' letter to A. D. Murrell, Los Angeles, California, he says:

"We are on the West Coast to stay."

On page 88 of the transcript, Mr. Jones' letter to Mr. Charles Von Der Ahe, Von's Market, Culver City, California: In this letter Mr. Jones points out that he attempted to call upon Mr. Von Der Ahe while he was in Los Angeles; that he visited several of the Von stores; that Griesedieck Western Brewery Co. has been on the Pacific Coast with its products, Stag and Hyde Park "75" for over a year.

> "Our business is increasing every day. It might interest you to know that we ship a carload a day into the California area, and I would also like to emphasize that Stag and Hype Park '75' are premium products."

On page 90 of the transcript, Mr. Jones is writing to the Certified Grocers of California in Los Angeles:

> "I sincerely appreciate the time you gave our representative, Mr. William LeVecke, and myself on my recent visit to Los Angeles. * * *
>
> I again want to thank you and your organization for the fine business you have been entrusting to us and you may be sure we appreciate this confidence. * * *.
>
> Mr. LeVecke and I have made a comprehensive survey of the Los Angeles area on beer sales and beer distribution * * *."

The matters set forth that were contained in the affidavit of Mr. William R. LeVecke and the matters that set forth that were attached to the affidavit of Reed LeVecke and marked Exhibit "A" were not contradicted by Griesedieck Western Brewery Co. or Carling Brewing Co. These statements show that Griesedieck Western Brewery Co. did solicit business over a period of four

years in the State of California in cooperation with their representative, Mr. William R. LeVecke; they built their business commencing in 1950, from zero, to the place where, as pointed out, and not denied, in the affidavit of William R. LeVecke, transcript, page 69,

> "that defendant Griesediecke Western Brewery Co. kept a steady flow of its beer products coming into the State of California between 1950 and November 30, 1954; that the business of said defendant was increased every year until during the year 1954, it became fifth in size of business done in the State of California among all breweries which imported beer into this State."

To argue in the face of this that the defendant Griesedieck Western Brewery Co. was not doing business in the State of California is to ignore all of the decisions that have followed the case of the *International Shoe Company v. Washington,* 326 U. S. 310, 90 L. Ed. 95; 66 S. Ct. 154.

The appellees here argue that while the California cases have adopted the "mere solicitation" rule in firm language, that nevertheless, this is not what the court meant, that what the courts of California meant to do was to go to the same point to which the court went in the case of *Frene v. The Louisville Cement Company,* 134 F. 2d 511 (1943). In that case the court discussed at great length all of the cases leading up to the *International Harvester Company v. Kentucky* and pointed out that the Supreme Court had forecast the abandonment of the solicitation plus rule, but that it was not necessary in *Frene v. The Louisville Cement Company* to go any further than to say that the abandonment of this rule would logically follow the *International Harvester Company v.*

Kentucky, 234 U. S. 579, 34 S. Ct. 944, 58 L. Ed. 1479, that in *Frene v. The Louisville Cement Company* the evidence showed solicitation plus.

This is also true in the case at bar. The evidence shows solicitation plus. It shows Mr. Jones, the President of the defendant Griesedieck Western Brewery Company, making four annual visits to the State of California, calling on all of the people in the State of California who were retailing the products of his company, calling on the buyers of these various organizations, making an effort to make a favorable contact with Lucky Stores Company in San Francisco through a friend that he had in the First California Company who in turn introduced him to Mr. Dardi, Chairman of the Board of Directors of Lucky Stores Company. We have Mr. Jones' letters covering four years, to various retail outlets in the State of California, to the chain markets, to Certified Grocers, to United Grocers and to Safeway Stores pointing out that Mr. Jones along with "our representative" William R. LeVecke, had made a most comprehensive survey of beer sales in the State of California and that if they desired any information with respect to this survey they could write to Mr. LeVecke and he would give them "excerpts" from the survey, not the survey itself, that being the property of Griesedeick Western Brewery Co., and made by Jones in the State of California accompanied by our representative Mr. LeVecke for the use and benefit of Griesedieck Western Brewery Co.

These facts destroy the four specific arguments made by the appellees: (1) that Mr. Jones, as the President of the Griesedieck Western Brewery Co., did not solicit busi-

ness in the State of California; (2) that there was not solicitation plus if that be necessary; (2) that there was conflict in the evidence with respect to the question of solicitation or solicitation plus; (4) the appellants lifted themselves by their own bootstraps to make themselves or attempt to make themselves the agents of Griesedieck Western Brewery Co. in the State of California.

Griesedieck Western Brewery Co. Held Out to All the People With Whom They Were Doing Business and From Whom They Were Soliciting Business That the Appellants Were Their Representatives in the State of California.

Mr. Jones, the President of Griesedieck Western Brewery Co., in his correspondence with United Grocers, Certified Grocers, Safeway Stores and the various chain stores and individual stores handling the products of the Griesedieck Western Brewery Co. in California, pointed out to each one of them that Mr. LeVecke was a representative of Griesedieck Western Brewery Co.

It is not necessary that we reiterate in this closing brief the cases cited by us in our opening brief, which cases follow to its logical conclusion the holding of the Supreme Court of the United States in the *International Shoe Company v. Washington, supra,* that

> "in the more recent decisions solicitation without more constitutes doing business within a state when the solicitation is a regular, continuous and substantial course of business."

This quotation is set forth in *Jeter v. Austin Trailer Equipment Company,* 122 Cal. App. 376 and it is lifted intact from *Koninkligke L. M. v. The Superior Court,* 107 Cal. App. 2d 495.

In the case at bar, we have solicitation carried on in a regular and continuous and substantial manner by Mr. Jones, the President of Griesedieck Western Brewery Co. both by his presence in California during his annual trips to this State in the promotion of the business of the Griesedieck Western Brewery Co. and in the letters attached to the affidavit of Mr. Reed LeVecke and set forth commencing at page 75 of the transcript going through to page 97 in which letters for a period from 1951 to 1954 he was soliciting business for his company in the State of California. That this constitutes a "regular, continuous and substantial course of business" cannot be doubted.

Carling Brewing Co.

With reference to the appellees' brief responding to the argument covering the activities of the Carling Brewing Co. in the State of California, there is really nothing that need be added to appellants' opening brief. The affidavit of the President of the Carling Brewing Co. [Tr. pp. 51 to 58] shows that the Carling Brewing Co. was not only soliciting business in the State of California, but that they were aiding and assisting retail agencies, in the development of that business, and the sale of their product, that they inspected the records of the distributors, checked on their volumes of sales, directed the distributors how they had to keep their records, recommended the use of various sales material. In other words, they brought themselves in this affidavit clearly within the solicitation plus rule.

We respectfully submit that by reason of the abundant uncontradicted and conclusive facts established in this matter, that the District Court's order on the motion quashing service of summons and complaint on the appellees should be reversed and that the appellees should be required to answer the complaint and proceed to trial.

Respectfully submitted,

THOMAS A. WOOD,
GEORGE R. LARWILL,
CHARLES W. WOLFE,
Attorneys for Appellants.

No. 14817

United States
Court of Appeals
for the Ninth Circuit

ROBERT RIDDELL, Collector of Internal Revenue, and HARRY C. WESTOVER, former Collector of Internal Revenue, Appellants,

vs.

EARL CALLAN and HELEN W. CALLAN, Appellees.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. —10-3-55

No. 14817

United States
Court of Appeals
for the Ninth Circuit

ROBERT RIDDELL, Collector of Internal Revenue, and HARRY C. WESTOVER, former Collector of Internal Revenue, Appellants,

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Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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* Page numbers appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, Southern District of California, Central Division

No. 13922-WB

EARL CALLAN and HELEN W. CALLAN,
Plaintiffs,

vs.

ROBERT RIDDELL and HARRY C. WESTOVER,
Defendants.

COMPLAINT FOR RECOVERY

Come now the Plaintiffs and for their First Cause of Action against Defendants allege:

I.

That this is an action to recover income taxes erroneously, wrongfully, and illegally assessed and collected in excessive amount, together with interest thereon, and is instituted against defendants under the Revenue laws of the United States.

II.

That at all times herein mentioned, plaintiffs were, and now are residents of the City of Los Angeles, County of Los Angeles, State of California; that the said place of residence is in the Central Division of the United States District Court in and for the Southern District of California; that references to "plaintiff" (singular) in Paragraphs III to IX, both inclusive, of this complaint shall be deemed to refer to plaintiff Earl Callan. [2]

III.

That defendant, Harry C. Westover, was duly appointed as Collector of Internal Revenue for the Sixth District of California, on or about July 1, 1943, and at all times mentioned herein before and including October 31, 1949, was the duly acting and qualified Collector for said District; that at all times herein mentioned, the defendant, Harry C. Westover, resided and now resides in the Central Division of the Southern District of the above entitled Court.

IV.

That at all times herein mentioned, plaintiffs were on a calendar year basis for tax purposes.

V.

For more than one year prior to and on and after March 2, 1938, plaintiff was the sole owner of real estate commonly known as 1740 Riverside Drive, Los Angeles, California, and 1723 Rancho, Los Angeles, California, together with all improvements, fixtures and appurtenances to said real estate. Plaintiff's original cost for the land at 1740 Riverside Drive was the sum of $11,725.00 and his cost for the improvements, fixtures and appurtenances to the real estate at 1740 Riverside Drive was $57,-360.00. Plaintiff's total cost for said land and improvements, fixtures and appurtenances at 1740 Riverside Drive was therefore, $69,085.00.

Plaintiff owned furniture and furnishings which were located at 1740 Riverside Drive at the time of the flood hereinafter referred to. Plaintiff's cost for

said furniture and furnishings was $45,295.00. For income tax purposes, no depreciation deduction was allowed to plaintiff against said costs, and the amount of depreciation allowable against said costs was inconsequential.

In addition, plaintiff owned various personal clothing, personal jewelry, personal effects and other personal non-business property which was located primarily on the second floor of the [3] residence building at 1740 Riverside Drive. Plaintiff's cost for such clothing, jewelry, effects and other personal non-business property was at least $15,420.00.

Plaintiff's original cost for the land at 1723 Rancho was in excess of $7,000.00 and plaintiff's cost for sprinkler system, landscaping, driveway and patio improvements to said land was in excess of $1500.00. Plaintiff's cost for said land with said sprinklers, landscaping, driveway and patio was, therefore, in excess of $8500.00. Plaintiff's cost for the swimming pool, walls and buildings located on said real estate at 1723 Rancho, was at least $28,-050.00 and the amount of depreciation allowed and allowable against said swimming pool, walls and buildings was $4,290.00 for income tax purposes at the time of the flood hereinafter referred to. The total cost to plaintiff of said real estate at 1723 Rancho, net after subtracting for depreciation allowed and allowable, was, therefore, $32,260.00 at the time of the flood hereinafter referred to.

Plaintiff owned the following personal property at the following designated cost to him, which was

situated at 1723 Rancho at the time of the flood hereinafter referred to:

Item		Cost
Oriental rug	at least	$3,500.00
Domestic Rug	at least	75.00
Bar and mirror	at least	150.00
Eight (8) Spanish Posters	at least	800.00
Total	at least	$4,525.00

The fair market value of all and each and every one of the said assets described in this paragraph V, was at least as great as the respective cost to plaintiff alleged herein, net after subtraction for depreciation allowed or allowable, as herein alleged.

At all times material herein, commencing prior to the year 1938 and continuously thereafter without interruption to the present [4] time, plaintiff has been engaged in the business of constructing, furnishing, owning, operating and renting residential real estate. On or about March 2, 1938, the real estate of 1723 Rancho was being rented by the plaintiff in the course of such business to Ralph Bellamy, and the real estate at 1740 Riverside Drive was being temporarily occupied by the plaintiff in the course of such business for the purpose of completing the proper furnishing at 1740 Riverside Drive and to follow his continuous business practice over a period of years to occupy residences in order to more advantageously display such residences to prospective tenants or purchasers, and plaintiff was engaged in the course of such business in efforts to rent said real estate at 1740 Riverside Drive.

VI.

On or about the 2nd day of March, 1938, the Los Angeles River overflowed its banks and levees and its normal channel, suddenly, and caused a flood which inundated plaintiff's said real estate at 1723 Rancho and 1740 Riverside Drive and entirely washed away and destroyed all the plaintiff's said swimming pool, walls, buildings and other real estate improvements, furniture, furnishing, personal clothing, personal jewelry, personal effects and all other personal property at 1740 Riverside Drive and 1723 Rancho, and so damaged plaintiff's land at said locations that the aggregate value of said lands after said flood was only Four Thousand Dollars ($4000.00).

VII.

From and after the time of said flood and continuously thereafter during the year 1938, plaintiff strongly believed and was advised by his attorneys that he could obtain reimbursement for his loss by legal action against the Los Angeles County Flood Control District. Accordingly, on or about May 31, 1938, plaintiff filed a claim against and with said Los Angeles County Flood Control District in the amount of Two Hundred Twenty Thousand Seven Hundred Forty Dollars ($220,740.00), for the purpose of obtaining reimbursement [5] for his aforesaid damages, in addition to other damages sustained by him by reason of said flood. This claim was denied by the Los Angeles County Flood Control District in December 1938. Plaintiff thereupon

commenced and, continuously until the time of filing suit, prosecuted preparations and work for the purpose of filing suit for such reimbursement. Plaintiff filed suit in the Superior Court in and for the County of Los Angeles against said Los Angeles County Flood Control District in February, 1939, and continuously and diligently prosecuted the case thereafter. The case was tried before the jury of the Superior Court in and for the County of Los Angeles in the year 1946. The jury was instructed by the said Court to bring in a verdict for and amount which the jury found to represent the difference between the loss which would have occurred in the absence of negligence by the Los Angeles County Flood Control District, and the actual loss sustained. The jury brought back a verdict in favor of plaintiff in the amount of $80,000.00. Plaintiff made no motion for a new trial, nor did plaintiff attempt to secure any remedy other than judgment for the amount of said verdict. Plaintiff thereupon at that time, in the year 1946, abandoned all efforts to secure any recovery or reimbursement in excess of the sum of $80,000.00.

VIII.

Said Superior Court entered a judgment in favor of plaintiff Earl Callan in the amount of $80,000.00 on or about March 27, 1946. The defendant, Los Angeles County Flood Control District filed a motion for new trial which was granted by said Superior Court on or about May 16, 1946. Plaintiff Earl Callan in the year 1946 appealed from the said

order of the Superior Court to the California District Court of Appeals and the California District Court of Appeals affirmed said order for new trial on October 17, 1947, and on December 15, 1947 the Supreme Court of California refused to grant a hearing of plaintiff's appeal from the decision of said District Court of Appeals [6] and the case was remanded to the Superior Court in and for the County of Los Angeles for a new trial. In the year 1948, plaintiff executed an agreement of settlement and release with the Los Angeles Flood Control District. Plaintiff's net recovery in said settlement after attorneys' fees and court costs, was in the amount of $8403.05.

IX.

In the said trial, the jury's instructions were to grant plaintiff a verdict only for that portion of his damages which would have occurred in the absence of negligence on the part of the Los Angeles County Flood Control District. Plaintiff's personal clothing, personal jewelry, personal effects and other personal property cost him about $15,420.00 and were located primarily on the second floor of the residence building at 1740 Riverside Drive and could have been saved if the inundation on plaintiff's property had been less severe. Some part of the buildings and improvements at 1723 Rancho and 1740 Riverside Drive could have been salvaged if said flood had been less severe. The said verdict was for reimbursement to plaintiff for the following losses in the following amounts:

For personal clothing, personal jewelry, personal effects and other personal, non-business property at 1740 Riverside Drive	$15,420.00
For damages to real estate, improvements, buildings, fixtures, appurtenances, furniture and furnishings at 1723 Rancho and 1740 Riverside Drive	64,580.00
Total	$80,000.00

X.

That throughout the year 1948 and continuously thereafter at all times to and including March 6, 1952, plaintiff Helen W. Callan was and now is a resident of the City of Los Angeles, County of Los Angeles, State of California, and the wife of plaintiff Earl Callan; that the said place of residence is in the Central Division of the United States District Court in and for the Southern District of [7] California.

That defendant Robert Riddell was duly appointed and acting as Acting Collector of Internal Revenue for the Sixth District of California from November 1, 1949, to April 30, 1950, both inclusive, and was duly appointed as Collector of Internal Revenue for the Sixth District of California on or about May 1, 1950, and at all times subsequent thereto and continuing to the date of filing this complaint has been the duly acting and qualified Collector for said district; that at all times herein mentioned the defendant, Robert Riddell, resided and now resides in the Central Division of the Southern District of the above entitled Court.

XI.

On or before March 15, 1949, plaintiffs filed their joint income tax return with the defendant Harry C. Westover, as Collector of Internal Revenue for the Sixth District of California, for the calendar year 1948, setting forth a net loss of at least $23,-986.81, and reporting upon said return a net tax liability of zero. Plaintiffs paid no income tax for the year 1948 at the time of filing said return.

XII

Plaintiffs' 1948 income tax return computed the net loss of $23,986.81 by reporting a deduction from plaintiffs' other 1948 income of a loss of $71,596.95. Said $71,596.95 represents the difference between the $80,000.00 jury verdict and judgment rendered in the year 1946, and the $8,403.05 net recovery in 1948. Plaintiffs' 1948 income tax return claimed no deduction for the balance of plaintiff Earl Callan's loss. Said balance of loss is the difference between the amount of the total flood damage and the $80,000.00 verdict.

XIII.

The deduction of $71,596.95 reported on plaintiffs' 1948 income tax return was properly allocated upon said return as a loss [8] attributable to business property in the amount of $57,796.64 and a loss attributable to personal effects in the amount of $13,800.31.

XIV.

On or about October 10, 1950, the Internal Revenue Agent in Charge for the Los Angeles Division

issued his report of examination of plaintiffs' 1948 joint income tax return, claiming additional 1948 tax liability from plaintiffs in the principal amount of $16,043.95. Said report erroneously and illegally adjusted plaintiffs' 1948 net income from a net loss of $23,986.81 to a net income of $49,621.83 by erroneously and illegally disallowing said deductions of $71,596.95 together with corollary adjustments. Pursuant to this report, in or about December, 1950, defendant Robert Riddell, Collector of Internal Revenue for the Sixth District of California, wrongfully, illegally and erroneously assessed against plaintiffs an income tax deficiency for the year 1948 in a principal amount of $16,043.95 together with interest in the amount of $2593.41, or a total of $18,637.36. On or about February 5, 1951, plaintiffs paid, under protest, said $18,637.36 to defendant Robert Riddell.

XV.

The true income tax liability of plaintiffs for the year 1948 was zero.

XVI.

The income tax and interest assessed against plaintiffs and paid by them, as aforesaid, in the sum of $18,637.36 was excessive and incorrectly computed and erroneously assessed, collected and retained by defendants and plaintiffs' net loss was incorrectly computed and incorrectly computed as net income by defendants and the Internal Revenue Agent in Charge for Los Angeles and the Commissioner of Internal Revenue, in the following particulars: [9]

A. Plaintiffs' Primary Position:

Plaintiffs' primary position is that in 1946, at the time of rendition of jury verdict and judgment for $80,000.00 plaintiff Earl Callan abandoned all efforts to secure any recovery or reimbursement in excess of the sum of $80,000.00 and thereupon, in 1946 finally sustained all of his damages and losses from said flood for income tax purposes, except the $80,000.00 represented by the verdict and judgment, against the Los Angeles County Flood Control District. Under this position, plaintiff Earl Callan sustained a loss in 1946 of $82,585.00 and in 1948 sustained a loss of $71,596.95 from said flood, computed as follows:

Item		Amount
1740 Riverside Drive—land		$ 11,725.00
1740 Riverside Drive—buildings, improvements, fixtures and appurtenances		57,360.00
1740 Riverside Drive—furniture and furnishings		42,295.00
1723 Rancho—land		8,500.00
1723 Rancho—House, stable, pools and dressing rooms		28,050.00
1723 Rancho—furnishings and posters		4,525.00
Total		$155,455.00
Less: Depreciation allowed and allowable on buildings and improvements at 1723 Rancho		$ 4,290.00
Adjusted cost basis of business assets immediately prior to 1938 flood		$151,165.00
Less: Fair market value of real estate at 1723 Rancho and 1740 Riverside Drive immediately after said flood	$4000	
Reimbursement for above assets represented by 1946 jury verdict ($80,000 verdict minus $15,420 for personal non-business items)	64580	68.580.00
Net amount of loss deductible in 1946 for income tax purposes		$ 82,585.00

1948 Loss

Total Net Amount $71,596.95

Net business loss and casualty loss on personal effects upon settlement of verdict.

Total amount of verdict	$ 80,000.00	
Recovered upon final settlement	8,403.05	
Percentage recovered	10.5038%	
Original verdict	$ 80,000.00	
Business portion	$64,580.00	
Personal effects	15,420.00	
Total	80,000.00	
Application of recovery percentage		
Business loss:		
Business portion of verdict	$ 64,580.00	
Amount recovered on settlement (10.5038%)	6,783.36	
Net business loss		$ 57,796.64
Personal effects loss		
Personal effects portion of verdict	15,420.00	
Amount recovered on settlement (10.5038%)	1,619.69	
Net loss on personal effects		13,800.31
Recapitulation		
Recovery: business	$6,783.36	
personal effects	1,619.69	
Total recovery		8,403.05

Net losses		
Business	$ 57,796.64	
Personal effects	13,800.31	
Total net loss		71,596.95
Amount of verdict		$ 80,000.00

Because the losses for the year 1948 as set forth above should have been allowed and subtracted, in accordance with law, plaintiffs' correct net income under the primary position is a net loss of at least $23,986.81 as correctly set forth upon the 1948 joint income tax return of Earl Callan and Helen W. Callan. [11]

The report of October 10, 1950 by the Internal Revenue Agent in Charge of the Los Angeles Division therefore erroneously, illegally and improperly disallowed and failed to subtract the following deductions in computing taxpayer's 1948 net income:

Loss attributable to business property	$ 57,796.64
Loss attributable to personal effects	13,806.31
Total	$ 71,596.95

B. Plaintiffs' Secondary Position:

Plaintiffs' secondary and alternative position is that for income tax purposes his loss from the March 2, 1938 flood was finally and entirely sustained by him in the year 1948 to the extent of the entire amount of such loss.

Under this position, the amount of plaintiffs' net loss in 1948 was at least $91,051.81 and the net operating loss in 1948 was at least $83,259.02, computed as follows:

Total adjusted cost basis of assets located at 1723 Rancho and 1740 Riverside Drive per subparagraph A of this paragraph XVI		$151,165.00
Less: fair market value of real estate at 1723 Rancho and 1740 Riverside Drive immediately after flood		4,000.00
Amount of loss		$147,105.00
Less: amount received in final settlement net after attorney's fees in costs in 1948		8,403.05
Net amount of loss in 1948 after reimbursement to extent of settlement proceeds		$138,661.95
Less: loss already deducted on 1948 income tax return as filed:		
Personal effects	$ 13,800.31	
Business loss	57,796.64	71,596.95
Loss under this alternative position to be added to loss per tax return for 1948		$ 67,065.00
Net loss per 1948 income tax return as filed		23,986.81
1948 net loss under this alternative position		$ 91,051.81
Less: Adjustment under Section 122(d), IRC to take long term capital gains into account at 100% instead of 50%		$ 7,792.79
Net operating loss in 1948		$ 83,259.02

The report of the Internal Revenue Agent in Charge of the Los Angeles Division therefore erroneously, illegally and improperly disallowed and failed to subtract losses for 1948 in the amount of $138,661.95 in computing plaintiffs' 1948 net income.

C. Substantive Legal Grounds:

Under both the primary and secondary positions of plaintiffs the losses in the respective amounts in-

dicated are deductible in 1948 on the following grounds:

The loss attributable to the business property at 1723 Rancho and 1740 Riverside Drive is a loss sustained in 1948:

(a) incurred in trade or business under Section 23(e)(1), Internal Revenue Code;

(b) Alternately, as a loss sustained in a transaction entered into for profit though not connected with the trade or business, under Section 23(e)(2), Internal Revenue Code;

(c) Alternatively, as a loss from storm or casualty of property not connected with the trade or business, not reimbursed by insurance or otherwise under Section 23(e)(3), Internal Revenue Code;

(d) Alternatively, as a loss from the involuntary conversion of real and depreciable property used in trade or business, under the provisions of sections 22(f), 113(a)(9), 111, 113(b) and 117(j) of the Internal Revenue Code.

The loss attributable to the personal effects is claimed as a loss sustained in 1948 as a loss of property not connected with the trade or business from storm or casualty, not reimbursed by insurance or otherwise under Section 23(e)(3), Internal Revenue Code. [13]

XVII.

On or about August 14, 1951, plaintiffs duly filed with the Collector of Internal Revenue for the Sixth District of California, defendant Robert Riddell, a claim for refund in the amount of $18,637.36 or such greater amount as is legally refund-

able, plus interest prescribed by law, with schedules attached and incorporated in said claim, setting forth the correct tax liability as zero, and setting forth as their grounds substantially the same grounds as are set forth in this complaint.

XVIII.

That more than six months has elapsed since the filing of said refund claim, and defendant Robert Riddell has failed and refused to allow said refund claim or any part thereof, and the Commissioner of Internal Revenue has neither allowed nor disallowed said claim.

XIX.

That defendant Robert Riddell has wrongfully, illegally and erroneously failed and refused, and still fails and refuses to refund to plaintiffs the sum demanded in the aforesaid claim, or any portion thereof, and that there is now due, owing and unpaid from said defendant to plaintiffs the aforesaid sum of $18,637.36 together with interest thereon from February 5, 1951, as prescribed by law.

For a further, separate and second cause of action against defendants, plaintiffs allege:

I.

Plaintiffs repeat and replead each and every allegation contained in Paragraphs I to XVI, both inclusive, of plaintiffs' First Cause of Action as though the same were herein set forth at length, but

excluding subparagraphs C(b) and C(c) of Paragraph XVI. [14]

II.

That on or before March 15, 1950, plaintiffs filed with defendant Robert Riddell as Collector of Internal Revenue for the Sixth District of California, their joint income tax return for the calendar year 1949; that plaintiffs in said return reported a joint net taxable income of $35,721.46 and a joint net tax liability of $9,429.46. Plaintiffs duly paid said tax liability of $9,429.46 in full on or before the 15th day of March, 1950, to the defendant Robert Riddell.

III.

On or about May 9, 1951, the Internal Revenue Agent in Charge for the Los Angeles Division issued his report of examination of plaintiffs' 1949 joint income tax return. Said report adjusted plaintiffs' net income by an increase of $2,529.02 for additional income from rental operations, and by a decrease of $1,000 for that portion of plaintiffs' $4,974.67 loss in 1949 from liquidation of Wolverine stock, which is deductible in 1949. That the Internal Revenue Agent in Charge reported that plaintiffs' joint net income for 1949 was $37,250.48, and claimed additional 1949 tax liability from plaintiffs in the principal amount of $654.74. Pursuant to this report, defendant Robert Riddell, Collector of Internal Revenue for the Sixth District of California, wrongfully, illegally and erroneously assessed against plaintiffs an income tax deficiency for the year 1949 in a principal amount of $654.74,

together with interest of $46.20, or a total of $700.94. Plaintiffs paid said $700.94 to defendant Robert Riddell on or about July 2, 1951.

IV.

That plaintiffs' joint 1949 income tax return and the said report of the Internal Revenue Agent in Charge both erroneously overstated plaintiffs' net income, in that both erroneously and improperly failed to deduct the amount of plaintiffs' net operating loss deduction allowable as a carry forward from the year 1948. [15]

That plaintiffs' net loss for the year 1948 is described in paragraph XVI in plaintiffs' first cause of action and incorporated in paragraph I of this cause of action, and was entirely a net operating loss for the year 1948 within the meaning of Section 122 of the Internal Revenue Code, except for the technical adjustments set forth in the next paragraph of this complaint.

V.

That pursuant to the allegations as herein set forth, there has been erroneously assessed against plaintiffs and erroneously claimed and retained from plaintiffs by defendant Robert Riddell, and plaintiffs have therefore overpaid their principal income tax liability for the year 1949 in the principal sum of either $1,287.80 under plaintiffs' primary position, or $5,905.00 under plaintiffs' secondary position. Plaintiffs' primary position and secondary position are as follows:

A. Plaintiffs' Primary Position:

Plaintiffs' primary position is that for income tax purposes, Earl Callan's loss from the March 2, 1938 flood was finally sustained by him in the year 1946 to the extent of the entire amount thereof except $80,000.00, which was the amount of the jury verdict and judgment granted to him in 1946.

The entire amount of the loss sustained in the year 1946, under plaintiffs' primary position, should properly be deducted from the income of years prior to 1949.

Under plaintiffs' primary position, the amount of plaintiffs' net operating loss carry-over deduction from 1948 in 1949 is at least $2,901.86 computed as follows:

1948 net loss per joint income tax return, as filed, of Earl and Helen Callan	$	23,986.81
Less: Adjustment under Section 122(d), I.R.C. to take long term capital gains into account at 100% instead of 50%		7,792.79
Net Operating loss in 1948	$	16,194.02
Less: Amount carried back to 1947		12,292.16
	$	3,901.86
(Other technical adjustments required under Section 122, I.R.C.) 1949 Capital Loss disallowed		1,000.00
Net Operating loss carry-over deduction from 1948 in 1949	$	2,901.86

Therefore, under plaintiffs' primary position, the total principal amount of income tax refund due plaintiffs is at least $1,287.80, computed as follows:

	Tax Liability	Net Income
Per original return filed on or before 3/15/50	$ 9,429.46	$35,721.46
Additional Rental Income per Revenue Agent's Report of 5/9/51		2,529.02
Capital Loss Allowable in 1949 per Revenue Agent's Report of 5/9/51		(1,000.00)
Additional tax assessed per Revenue Agent's Report of 5/9/51	654.74	
Total	$ 10,084.20	$37,250.48
Less: Net operating loss carry-forward deduction		(2,901.86)
Correct tax liability and net income	$ 8,842.60	$34,348.62
Principal tax refund due taxpayers	$ 1,241.60	
Interest Paid	46.20	
Total principal amount of refund due	$ 1,287.80	

B. Plaintiffs' Secondary Position:

Plaintiffs' secondary position is that for income tax purposes Callan's loss from the March 2, 1938 flood was finally and entirely sustained by him in the year 1948 to the extent of the entire amount of such loss.

Under this position, the amount of plaintiffs' net operating loss in 1948 was at least $83,259.02, computed as follows:

Total adjusted cost basis of assets located at 1723 Rancho and 1740 Riverside Drive	$151,165.00
Less: Fair market value of real estate at 1723 Rancho and 1740 Riverside immediately after flood	4,000.00
Amount of loss	$147,165.00

Less: Amount received in final settlement net after attorney's fees and costs in 1948		8,403.05
Net amount of loss in 1948 after reimbursement to extent of settlement proceeds		$138,661.95
Less: Loss already deducted in 1948 income tax return as filed:		
Personal effects	$ 13,800.31	
Business loss	57,796.64	71,596.95
Loss under this alternative position to be added to loss per tax return for 1948		$ 67,065.00
Net loss per 1948 tax return as filed		23,986.81
1948 net loss under this alternative position		$ 91,051.81
Less: Adjustment under Section 122(d) I.R.C. to take long term capital gains into account at 100% instead of 50%		7,792.79
Net operating loss in 1948		$ 83,259.02

Under this alternative position, the net operating loss carryover deduction from 1948 in 1949 is therefore at least $15,678.29, computed as follows:

1948 Net Operating Loss		$ 83,259.02
Less: Amounts carried back to prior years:		
1946	$ 33,582.48	
1947	32,998.25	66,580.73
		$ 16,678.29
Other technical adjustments required under Section 122 of Internal Revenue Code—1949 Capital Loss Disallowed for carry-forward		1,000.00
Net operating loss carry-over deduction from 1948 in 1949		$ 15,678.29

After deduction of this $15,678.29, plaintiffs' correct net income is $21,572.19, correct tax liability

is $4,179.20, and principal tax refund due is $5,905.00.

VI.

That on or about August 24, 1951, plaintiffs duly filed with defendant Robert Riddell, Collector of Internal Revenue for the Sixth District of California, their joint claim for refund for the year 1949 in the sum of $5,951.20 or such greater amount as is legally refundable plus interest as prescribed by law. This refund claim stated as plaintiffs' grounds substantially the same grounds as are set forth in the complaint.

VII.

That more than six months have elapsed since the filing of said refund claim, and defendant Robert Riddell has failed and refused to allow said refund claim or any part thereof, and the Commissioner of Internal Revenue has neither allowed nor disallowed said claim.

VIII.

That defendant Robert Riddell has wrongfully, illegally and erroneously failed and refused, and still fails and refuses to [19] refund to plaintiffs the sum demanded in the aforesaid claim or any portion thereof, and that there is now due, owing and unpaid from said defendant to plaintiffs the aforesaid sum of $5,951.20, together with interest thereon from February 5, 1951, as prescribed by law.

For a further, separate and third cause of action against defendants, plaintiffs allege:

I.

Plaintiffs repeat and replead each and every allegation contained in Paragraphs I to XVI, both inclusive, of plaintiffs' First Cause of Action as though the same were herein set forth at length, but excluding subparagraphs C(b) and C(c) of Paragraph XVI.

II.

That on or before the 15th day of March, 1948, plaintiff Earl Callan filed with the Defendant Harry C. Westover as Collector of Internal Revenue for the Sixth District of California, his income tax return for the year 1947; that plaintiff in said return correctly reported a net income of zero. Plaintiff paid no income tax for the year 1947 at the time of filing said return.

III.

On or about October 10, 1950, the Internal Revenue Agent in Charge for the Los Angeles Division issued his report of examination of plaintiff Earl Callan's 1947 income tax return, claiming additional 1947 tax liability from said plaintiff in principal amount of $14,044.67. Said report erroneously and illegally adjusted plaintiff's 1947 net income from a zero net income to a net income of $32,998.25. Pursuant to this report, defendant Robert Riddell, as Collector of Internal Revenue for the Sixth District of California, wrongfully, illegally and erroneously assessed against plaintiff Earl Callan

an income tax deficiency for the year 1947 in a principal amount of $14,044.67, together with interest in the amount of $2,270.23, or a total of $16,-314.90. On or about February 5, 1951, plaintiff Earl Callan [20] paid under protest said $16,314.90 to defendant Robert Riddell.

IV.

Plaintiff's true income tax liability for the year 1947 was zero.

V.

That the said report of the Internal Revenue Agent in Charge erroneously overstated plaintiff's net income in that the report erroneously and improperly failed to deduct the amounts of plaintiff's net operating loss deductions allowable as a carryback from the year 1948 and a carryforward from the year 1946 under plaintiff's primary position, and allowable as a carryback from the year 1948 under plaintiff's secondary position. Plaintiff's net losses for the years 1946 and 1948 were entirely net operating losses for those respective years within the meaning of Section 122 of the Internal Revenue Code, except for the technical adjustments set forth in the next paragraph of this complaint.

VI.

The income tax and interest assessed against plaintiff Earl Callan and paid by him, as aforesaid, in the sum of $16,314.90 was excessive and incorrectly computed and erroneously assessed, collected and retained by defendant Robert Riddell and the

Internal Revenue Agent in Charge for Los Angeles and the Commissioner of Internal Revenue in the following particulars:

A. Plaintiff's Primary Position:

Plaintiff's primary position is that in 1946, at the time of rendition of jury verdict and judgment for $80,000.00, plaintiff Earl Callan abandoned all efforts to secure any recovery or reimbursement in excess of the sum of $80,000.00 and thereupon, in 1946 finally sustained all of his damages and losses from said flood for income tax purposes, except the $80,000.00 represented by the verdict and judgment against the Los Angeles County Flood Control District. [21]

Under this position, the amount of plaintiff Earl Callan's net operating loss in 1946 was at least $50,-002.05, computed as follows:

Adjusted Cost Basis of Business Assets immediately prior to 1938 flood		$151,165.00
Less: Fair Market Value of Real Estate at 1723 Rancho and 1740 Riverside Drive immediately after said flood	$ 4,000.00	
Reimbursement for above assets represented by 1946 Jury Verdict ($80,000 verdict minus $15,420 for personal non-business items)	64,580.00	68,580.00
Net Amount of loss in 1946 for Income Tax Purposes		$ 82,585.00
Less: Technical Adjustment to Charity Deduction because of said loss	$ 153.50	
Net Income for 1946 except for above loss	34,428.98	
Net Operating Loss for 1946		$ 50,002.05

The net operating loss carryover deduction from 1946 in 1947 is therefore at least $20,706.09, computed as follows:

1946 Net Operating Loss		$ 50,002.05
Less: Amounts carried back to prior years:		
1944	$ 8,362.68	
1945	20,933.28	
Total carried back to prior years		29,295.96
Net operating loss carryover from 1946 to 1947		$ 20,706.09
Technical adjustments required under Section 122 of Internal Revenue Code		None
Net Operating loss carryover deduction from 1946 in 1947		$ 20,706.09

Furthermore, the plaintiff's 1948 income tax return, which set forth the loss in 1948 from settlement of the claim for the $80,000 verdict for $8,403.05, correctly set forth facts which show that the net operating loss carry-back deduction from 1948 in 1947 is at least $16,194.02, computed as follows:

1948 net loss per joint income tax return, as filed, of Earl and Helen Callan		$ 23,986.81
Less: Adjustment under Section 122(d), I.R.C. to take long term capital gains into account at 100% instead of 50%		7,792.79
Net operating loss in 1948		$ 16,194.02
Amounts carried back to prior years		None
Net operating loss carryback from 1948 to 1947		$ 16,194.02
Oher technical adjustments required under Section 122 of Internal Revenue Code		None
Net operating loss carryback deduction from 1948 in 1947		$ 16,194.02

The amount of the 1948 net operating loss carryback to be applied as a deduction and used against 1947 income is at least $12,292.16, since that is the portion thereof necessary to reduce plaintiff's 1947 net income to zero.

The report of October 10, 1950, by the Internal Revenue Agent in Charge of the Los Angeles Division therefore erroneously, illegally and improperly disallowed and failed to subtract the following deduction in computing plaintiff's 1947 net income:

Net operating loss carryover deduction from 1946	$ 20,706.09
Net operating loss carryback deduction from 1948	12,292.16
Total	$ 32,998.25

Because such deductions should have been allowed and subtracted, in accordance with law, plaintiff Earl Callan's correct net income for 1947 is zero, and the correct income tax liability for 1947 is zero. [23]

B. Taxpayer's Secondary Position:

Taxpayer's secondary and alternative position is that for income tax purposes his loss from the March 2, 1938, flood was finally and entirely sustained by him in the year 1948 to the extent of the entire amount of such loss.

Under this position, the amount of taxpayer's net operating loss in 1948 was at least $83,259.02, computed as follows:

Total adjusted cost basis of assets located at 1723 Rancho and 1740 Riverside Drive, per subparagraph A of this paragraph VI	$151,165.00

Less: Fair market value of Real Estate at 1723 Rancho and 1740 Riverside Drive, immediately after flood....		4,000.00
Amount of loss		$147,165.00
Less: Amount received in final settlement net after attorney's fees and costs in 1948		8,403.05
Net amount of loss in 1948 after reimbursement to extent of settlement proceeds		$138,661.95
Less: Loss already deducted on 1948 income tax return as filed:		
Personal Effects	$ 13,800.31	
Business Loss	57,796.64	71,596.95
Loss under this alternative position to be added to loss per tax return for 1948		$ 67,065.00
Net loss per 1948 income tax return as filed		23,986.81
1948 net loss under this alternative positions		$ 91,051.81
Less: Adjustment under Section 122(d), I.R.C., to take long term capital gains into account at 100% instead of 50%		7,792.79
Net operating loss in 1948		$ 83,259.02

Under this alternative position, the net operating loss carryback deduction from 1948 in 1947 is therefore at least $32,998.25, computed as follows:

1948 net operating loss	$ 83,259.02
Less: Amount carried back to 1946	33,582.48
Net operating loss carryback to 1947	$ 49,676.54
Other technical adjustments required under Section 122 of Internal Revenue Code	None
Net operating loss carryback deduction from 1948 in 1947	$ 49,676.54

Under this alternative position, the amount of the 1948 net operating loss carryback to be applied

as a deduction and used against 1947 income is at least $32,998.25, since that is the portion thereof necessary to reduce taxpayer's 1947 net income to zero.

The report of the Internal Revenue Agent in Charge of the Los Angeles Division therefore erroneously, illegally and improperly disallowed and failed to subtract the net operating loss carryback deduction from 1948 in the amount of $32,998.25 in computing taxpayer's 1947 net income.

Because such deductions should have been allowed and subtracted, in accordance with law, taxpayer's correct net income for 1947 is zero, and the correct income tax liability for 1947 is zero.

VII.

On or about August 14, 1951, plaintiff duly filed with the Collector of Internal Revenue for the Sixth District of California, defendant Robert Riddell, a claim for refund in the amount of $16,314.90 or such greater amount as is legally refundable, plus interest prescribed by law, with schedules attached and incorporated in said claim, setting forth the correct tax liability as zero, and setting forth as his grounds substantially the same grounds as are set forth in this complaint. [25]

VIII.

That more than six months have elapsed since the filing of said refund claim, and defendant Robert Riddell has failed and refused to allow said refund

claim or any part thereof, and the Commissioner of Internal Revenue has neither allowed or disallowed said claim.

IX.

That defendant Robert Riddell has wrongfully, illegally and erroneously failed and refused, and still fails and refuses to refund to plaintiff the sum demanded in the aforesaid claim or any portion thereof, and that there is now due, owing and unpaid from said defendant to plaintiff the aforesaid sum of $16,314.90, together with interest thereon from February 5, 1951, as prescribed by law.

For a further, separate and fourth cause of action against defendant, plaintiffs allege:

I.

Plaintiffs repeat and replead each and every allegation contained in Paragraphs I to XV, both inclusive, of plaintiffs' first cause of action as though the same were herein set forth at length.

II.

Plaintiff Earl Callan finally and entirely sustained his loss from the March 2, 1938 flood for income tax purposes in the year 1948 to the extent of the entire amount of such loss. The amount of plaintiffs' net loss in 1948 was therefore at least $91,051.81, and the net operating loss in 1948 was at least $83,259.02, computed as follows: [26]

Total adjusted cost basis of assets located at 1723 Rancho and 1740 Riverside Drive		$151,165.00
Less: Fair market value of real estate at 1723 Rancho and 1740 Riverside Drive immediately after flood		4,000.00
Amount of loss		$147,165.00
Less: Amount received in final settlement net after attorney's fees and costs in 1948		8,403.05
Net amount of loss in 1948 after reimbursement to extent of settlement proceeds		$138,661.95
Less: Loss already deducted on 1948 income tax return as finally sustained in 1948 from flood of 1938:		
Personal effects	$ 13,800.31	
Business loss	57,796.64	71,596.95
Loss to be added to loss per tax return for 1948		$ 67,065.00
Net loss per 1948 income tax return as filed		23,986.81
1948 net loss		$ 91,051.81
Less: Adjustment under Section 122(d) I.R.C., to take long term capital gains into account at 100% instead of 50%		7,792.79
Net operating loss in 1948		$ 83,259.02

The report of the Internal Revenue Agent in Charge of the Los Angeles Division therefore erroneously, illegally and improperly disallowed and failed to subtract losses for 1948 in the amount of $138,661.95 in computing plaintiffs' 1948 net income.

Said losses are deductible in computing plaintiffs' 1948 net loss on the following grounds:

The loss attributable to the business property at 1723 Rancho and 1740 Riverside Drive is a loss sustained in 1948:

(a) incurred in trade or business under Section 23(e)(1), Internal Revenue Code. [27]

(b) Alternatively, as a loss from the involuntary conversion of real and depreciable property used in trade or business, under the provisions of Sections 22(f), 113(a)(9), 111, 113(b), and 117(j) of the Internal Revenue Code.

The loss attributable to the personal effects is a loss sustained in 1948 as a loss of property, not connected with the trade or business, from storm or casualty, not reimbursed by insurance or otherwise, and deductible under Section 23(e)(3) of the Internal Revenue Code.

III.

That on or before the 15th day of March, 1947, plaintiff Earl Callan filed with defendant Harry C. Westover as Collector of Internal Revenue for the Sixth District of California his income tax return for the calendar year 1946; that said plaintiff in that return reported a net taxable income of $32,-428.98 and a total tax liability for the calendar year 1946 of $13,400.67. Said plaintiff paid this $13,-400.67 in full on or before the 15th day of March, 1947, to defendant Harry C. Westover as such Collector.

IV.

That plaintiff Earl Callan's correct 1946 income tax liability at no time exceeded $13,400.67. That at the end of the calendar year 1948, said plaintiff's true and correct 1946 net income and income tax liability for the year 1946 both became zero because

of the plaintiff's net operating loss for the year 1948 of $83,259.02, described in paragraph II of this cause of action. That said $83,259.02 was entirely a net operating loss for 1948 within the meaning of Section 122 of the Internal Revenue Code. That at least $33,582.48 of plaintiff's said 1948 loss was a net operating loss carryback to 1946 within the meaning of Section 122 of the Internal Revenue Code. That the adjustments to said carryback under the provisions of said Section 122 to arrive at the net [28] operating loss carryback deduction for the year 1946 were in the amount of $1,153.50, and that plaintiff's net operating loss carryback deduction for the year 1946 was at least $32,428.98.

V.

That pursuant to the allegations as herein set forth there has been erroneously assessed against plaintiff and claimed and retained from the plaintiff Earl Callan, and he has therefore overpaid his income tax liability for the year 1946 in the principal sum of $13,400.67, together with interest thereon from March 15, 1949, at the rate of 6% per annum, as provided by law.

VI.

That on or about August 14, 1951, plaintiff duly filed with the Collector of Internal Revenue for the Sixth District of California, Robert Riddell, defendant herein, a claim for refund for the year 1946 in the sum of $13,400.67, stating as his grounds substantially the same grounds as are set forth in this complaint.

VII.

That more than six months have elapsed since the filing of said refund claim, and defendant Robert Riddell has failed and refused to allow said refund claim or any part thereof, and the Commission of Internal Revenue has neither allowed nor disallowed said claim.

VIII.

That the claim for refund referred to herein was duly filed within three years from and after the date of filing of the 1948 income tax return of plaintiffs.

IX.

That defendant Harry C. Westover and defendant Robert Riddell have both failed and refused and still fail and refuse to refund to plaintiff Earl Callan the sums demanded in the aforesaid claim, or any portion thereof. That such failure and refusal by either Harry C. Westover or Robert Riddell or by both of them, [29] jointly and/or severally, is wrongful, illegal and erroneous. That there is now due, owing and unpaid to plaintiff Earl Callan by either defendant Harry C. Westover or defendant Robert Riddell or by both of them, jointly and/or severally, the sum of $13,400.67, together with interest thereon at the rate of 6% per annum from March 15, 1949, as prescribed by law.

Wherefore, plaintiffs pray for judgment against defendants as follows:

1. For $18,637.36 on the First Cause of Action;
2. For $5,951.20 on the Second Cause of Action;
3. For $16,314.90 on the Third Cause of Action;
4. For $13,400.67 on the Fourth Cause of Action,

together with interest on each and every such amount, as provided by law, for costs of suit incurred herein, and for such other further relief on each and every such cause of action as the Court may deem meet and proper in the premises.

BRAND, ROSENTHAL, NORTON, & MILLER,
/s/ By HERBERT S. MILLER,
Attorneys for Plaintiffs. [30]

DEMAND FOR JURY TRIAL

Notice to Defendants, Harry C. Westover and Robert Riddell:

Plaintiffs hereby demand trial by jury as to the facts and issues set forth in paragraphs V, VI, VII, VIII, IX and XII of plaintiffs' first cause of action, and as to the same facts and issues under plaintiffs' second, third and fourth causes of action, and as to the issue that under plaintiffs' secondary position the $83,259.02 was entirely a net operating loss for 1948 within the meaning of Section 122 of the Internal Revenue Code and that under plaintiffs' primary position the $16,194.02 was entirely the net

operating loss for 1948 within the meaning of Section 122 of the Internal Revenue Code.

BRAND, ROSENTHAL, NORTON & MILLER,
/s/ By HERBERT S. MILLER,
Attorneys for Plaintiffs. [31]

[Endorsed]: Filed March 10, 1952.

United States District Court for the Southern District of California, Central Division

No. 13357-WM

EARL CALLAN, Plaintiff

vs.

HARRY C. WESTOVER, Defendant.

NOTICE OF MOTION TO DISMISS

To the plaintiff, Earl Callan, and to Brand, Rosenthal, Norton & Miller, his attorneys:

You and each of you will please take notice, that on Monday, the 21st day of April, 1952, at 1:30 p.m., or as soon thereafter as counsel can be heard, in Courtroom No. 2, before the Honorable William C. Mathes, in the Post Office and Court House Building, 312 North Spring Street, Los Angeles, California, defendant will move this Court to dismiss the above entitled case on the ground that the complaint, and each cause of action thereof, fails to state a claim upon which relief can be granted.

Dated: This 3rd day of April, 1952.

WALTER S. BINNS,
United States Attorney
E. H. MITCHELL and
EDWARD R. McHALE,
Assistant U. S. Attorneys
EUGENE HARPOLE and
FRANK W. MAHONEY,
Special Attorneys, Bureau of
Internal Revenue
/s/ EDWARD R. McHALE,
Attorneys for Defendant [32]

Memorandum of Points and Authorities in Support of Motion to Dismiss

Preliminary Statement

The plaintiff seeks recovery of taxes allegedly overpaid and for which he has filed claims for refund for the years 1944, 1945, and 1946. All three causes of action are dependent upon the plaintiff establishing a deductible loss for the year 1946, which, under his second and third causes of action, he seeks to carry back to the years 1944 and 1945 as net operating loss carry-backs. Therefore, if plaintiff fails to establish a deductible loss for the year 1946, all causes of action fall.

Question Presented

Whether the complaint and each cause of action of the complaint fails to state a claim against defendant because the loss occurred, and could only be deducted, in the year 1938.

Statute Involved

Internal Revenue Code, Sec. 23. Deductions from gross income.

In computing net income, there shall be allowed as deductions:

(e) Losses by individuals.—in the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise. * * *

Statement of Facts

For the purposes of this motion, taking the allegations of fact as true, the following is a concise statement of the material facts (paragraphs V through IX, exclusive):

The plaintiff suffered a property loss of $220,-740.00, not compensated for by insurance, by reason of a flood in March, 1938. Plaintiff filed a claim against Los Angeles Flood Control District which was denied in December, 1938. Plaintiff attempted to recover from the Los Angeles Flood Control District the amount of his losses by a legal action filed in 1939. In 1946, plaintiff recovered a jury verdict for part of the amount of the claimed loss, $80,000.

In 1947, the Los Angeles Flood Control District was granted a new trial, which order granting the new trial after appeal to the California [33] Supreme Court, became final in 1947. In 1948, plaintiff settled his claim against the Los Angeles Flood Control District for $8,403.05.

The Loss occurred in 1938 and was not compensated for by insurance or otherwise.

I. The Loss occurred in 1938.

The Supreme Court, in the leading case, United States vs. White Dental Company, 274 U.S. 398, said that the loss statute contemplates the deduction from gross income of losses which are fixed by identifiable events such as the sale of property or losses caused by its destruction or physical injury. The flood which occurred in March, 1938, was such an identifiable event.

II. The Loss was not compensated for by insurance.

The Internal Revenue Code states that there shall be allowed as deductions losses sustained during the taxable year and not compensated for by insurance or otherwise.

In paragraph XII of the complaint, plaintiff alleged that the loss was not reimbursed by insurance.

III. The Loss occurred in 1938 and was not compensated for "otherwise".

In December, 1938, the Los Angeles Flood Control District had denied liability for the damages sustained by plaintiff. (Complaint, para. VII) Therefore, in 1938 plaintiff had suffered a loss not compensated for by insurance or otherwise.

> Commissioner vs. Highway Trailer Co., 72 F.(2d) 913 (7 Cir., 1934), cert. den. 293 U.S. 626, 79 L.Ed. 713, 55 S.Ct. 731; petition for rehearing denied, 294 U.S. 731, 79 L.Ed. 1261, 55 S.Ct. 505.

In that case a Wisconsin corporation suffered a fire in 1921 which destroyed property of the value

of $165,000 not covered by insurance. In 1921 the taxpayer sued the Janesville Electric Company for negligence. In 1924 taxpayer recovered a $47,000 judgment and thereupon wrote off its books the difference of $118,000, and claimed a deduction of that amount in its 1924 income tax return. The Electric Company appealed the judgment and secured its reversal in 1925. The taxpayer then claimed a $47,000 deduction in 1925. The Commissioner [34] disallowed both deductions, holding that the entire deduction should have been claimed for 1921. The Board of Tax Appeals sustained the taxpayer, but the Court of Appeals for the 7th Circuit reversed the Board of Tax Appeals.

The Court held, at page 915, as follows:

"Where, as in the case at bar, an actual physical loss occurs, resulting in a certain definite, fixed amount of damage, it seems better practice to allow the deduction for that entire amount of damage (not covered by insurance) in the year in which the loss actually occurs, according to the rule in the White Dental Case, rather than to defer it until the subsequent events indicate whether or not a recovery is to be had from other parties for a part of the loss. We think that this does not conflict with the rule of the Huff Case, supra, that 'the loss "must be actual and present"' because the loss is actual and present as soon as the physical damage occurs, as distinct from the situation where the loss claimed arises from a liability which may or may not ever materialize."

The Highway Trailer Case is on all fours with the case at bar. The similarity of the facts of the two cases is striking.

It is clear under the doctrine of that case that Earl Callan had a deductible loss in the year 1938 but none in the year 1946.

In Commissioner vs. John Thatcher & Son, 76 F.(2d) 900 (2 Cir., 1935) the Court said, at page 902:

"The loss occurred when the expenditures were made and was then deductible unless it was compensated for by insurance or otherwise. We think that the taxpayer's claim for damages against the subcontractor and other sureties was too contingent and uncertain to be treated as compensation by 'insurance or otherwise' for the loss." [35]

The belief of Earl Callan that he could obtain reimbursement of his loss by legal action against the Los Angeles Flood Control District (Complaint, paragraph VII) was "too contingent and uncertain" in the words of the 2nd Circuit to be treated as compensation by "insurance or otherwise".

Conclusion

Because the facts alleged clearly show that plaintiff suffered a loss by reason of a flood in March, 1938, which was an identifiable event, and because the loss was not compensated for by insurance or otherwise, it is respectfully submitted that plaintiff, in his suit on claims for refund based on a loss sought to be deducted in the year 1946, fails to state a claim against the defendant upon which relief may

be granted. Therefore, the complaint should be dismissed. [36]

Affidavit of Service by Mail Attached. [37]

[Endorsed]: Filed April 4, 1952.

[Title of District Court and Cause No. 13922.]

MINUTES OF THE COURT

Date: June 11, 1952, at: Los Angeles, Calif.

Present: The Honorable Wm. C. Mathes, District Judge; Deputy Clerk: P. D. Hooser; Reporter: A. H. Bargion; Counsel for Plaintiffs: no appearance; Counsel for Defendants: Edw. R. McHale, Ass't U.S. Att'y.

Proceedings: For hearing re extension of time for Gov't to plead herein, for the reason that a motion to dismiss the similar case of Earl Callan vs. Westover, Civil No. 13,357-WM, is under submission by this Court at this time.

It is ordered, on motion of Attorney McHale, that time for Gov't to plead herein is extended to July 31, 1952.

EDMUND L. SMITH,
Clerk [38]

[Title of District Court and Cause No. 13357.]

ORDER ON DEFENDANT'S MOTION TO DISMISS

This cause having come before the court for hearing on defendant's motion, filed April 4, 1952, to dismiss plaintiff's complaint for failure to state a claim or cause of action for which relief can be granted [Fed. R. Civ. P. 8(a), 12(b)(6)]; and the motion having been argued and submitted for decision; and it appearing to the court:

(a) that plaintiff seeks inter alia to recover income taxes claimed to have been erroneously paid for the year 1946, and this recovery is sought upon the ground that certain of plaintiff's property was allegedly destroyed by flood in 1938, and he "strongly believed and was advised by his attorneys that he could obtain reimbursement" from Los Angeles County Flood Control District, and plaintiff did diligently press suit until a settlement and partial [39] reimbursement was effected in 1948;

(b) that since destruction of plaintiff's property by flood was an "identifiable event," plaintiff's claimed loss must be considered as sustained during the taxable year of 1938 [26 U.S.C. § 23(e); United States vs. White Dental Co., 274 U.S. 398, 401 (1927); CIR vs. Highway Trailer Co., 72 F.2d 913, 914-915 (7th Cir. 1934), cert. denied, 293 U.S. 626 (1935)]; and

(c) that inasmuch as any loss which Los Angeles County Flood Control District might assert for

1938 because of possible liability to plaintiff would be disallowed as "too contingent" [Burnet vs. Huff, 288 U.S. 156, 160 (1933); Lucas vs. American Code Co., 280 U.S. 445, 450 (1930)], plaintiff's claim against the Flood Control District must likewise be held "too contingent and uncertain to be treated as compensation by 'insurance or otherwise'" within the meaning of 26 U.S.C. § 23(e) [CIR vs. John Thatcher & Son, 76 F.2d 900, 902 (2d Cir. 1935); Hinrichs vs. Helvering, 95 F.2d 117, 118 (D.C. Cir. 1938); Niagara Share Corp. vs. CIR, 82 F.2d 208, 211-212 (4th Cir. 1936); CIR vs. Highway Trailer Co., supra, 72 F.2d at 913];

It is now ordered that defendant's motion to dismiss, filed April 4, 1952, be and is hereby granted upon the ground that the facts alleged in plaintiff's complaint do not constitute a claim or cause of action for which relief can be granted [Fed. R. Civ. P. 12(b)(6)], with leave to plaintiff to serve and file amended complaint within twenty days from the date of this order if so advised.

It is further ordered that the Clerk this day serve [40] copies of this order by United States mail on the attorneys for the parties appearing in this cause.

Dated: September 18, 1952.

/s/ WM. C. MATHES,
United States District Judge. [41]

[Endorsed]: Filed Sept. 18, 1952.

[Title of District Court and Cause No. 13922.]

NOTICE OF MOTION AND MOTION TO DISMISS

To the plaintiffs, Earl Callan and Helen Callan, and to Brand, Rosenthal, Norton and Miller, their attorneys:

You, and each of you, will please take notice, that on Monday, October 13, 1952, at 1:30 p.m., or as soon thereafter as counsel can be heard, in Courtroom No. 2, before the Honorable William C. Mathes, in the Post Office and Court House Building, 312 North Spring Street, Los Angeles, California, defendants will move this Court to dismiss the above entitled case on the ground that the complaint, and each cause of action thereof, fails to state a claim upon which relief can be granted.

Dated: This 1st day of October, 1952.

WALTER S. BINNS,
United States Attorney

E. H. MITCHELL and
EDWARD R. McHALE,
Assistant U.S. Attorneys

EUGENE HARPOLE and
FRANK W. MAHONEY,
Special Attorneys, Bureau of Internal Revenue

/s/ EDWARD R. McHALE,
Attorneys for Defendants [42]

Memorandum of Points and Authorities in Support of Motion to Dismiss

This motion is based upon the memoranda of points and authorities filed in support of the motion to dismiss in Earl Callan vs. Westover, Civil No. 13357-WM, and the Order of Court granting said motion, filed on September 18, 1952.

The substantive facts alleged in the complaint in the case at bar are the same as those alleged in case No. 13357-WM. The gravamen of plaintiffs' claim in said case was set forth in paragraphs V, VI, VII, VIII and IX of the first cause of action and by reference incorporated in the other causes of action. With but one change, the omission of a conclusion of law, said paragraphs are set forth verbatim as paragraphs V, VI, VII, VIII and IX, respectively, of the first cause of action of the complaint herein, and are incorporated by reference in each and every other cause of action herein.

The sole change in said paragraphs was the omission herein of part of the last sentence in paragraph VII in case No. 13357-WM, the following conclusion of law:

> "and thereupon [1946] finally sustained all of his damages and losses from said flood except the $80,000 represented by the verdict of the Los Angeles Flood Control District."

In the case at bar, Earl Callan and his wife, Helen, are joined as plaintiffs, because the four different refund claims upon which this suit is based and which concern the calendar years 1946, 1947,

1948, and 1949, are essentially based on plaintiffs' contention that the loss occurred in the year 1948, a year in which the plaintiffs filed joint returns. They also filed joint returns in 1949.

By reason of the net operating loss carry-over and carry-back provisions of the Internal Revenue Code, plaintiffs seek to carry forward and back said "losses" from the year 1948 to the years 1949, 1946 and 1947.

The first cause of action of plaintiffs' complaint is based on the [43] refund claim for the year 1948 and presents alternative theories. The first contention is that the balance of the flood loss not claimed in 1946 (in case No. 13357) occurred in 1948 when the final and only recovery of $8,400 for damages was made. On the other hand, the contention is made that the entire deductible loss occurred for the taxpayers in 1948. As the other causes of action are dependent upon one or the other of these two theories and seek only to carry over or back said "1948 loss" to 1946, 1947, and 1949, the ruling of the Court in action No. 13357-WM is wholly decisive of this motion.

On the facts therein alleged, which are the same as herein alleged, the Court ruled that destruction of plaintiffs' property by flood was an "identifiable event" giving rise to a loss sustained during the taxable year 1938 and as any loss which the Los Angeles Flood Control District might assert for 1938 because of possible liability to plaintiffs would be disallowed as too contingent, plaintiffs' claim against the Flood Control District must likewise be

held too contingent and uncertain to be treated as "insurance or otherwise" within the meaning of 26 U.S.C. §23(e).

On the basis of the decision and Order of Court in action No. 13357-WM, it is respectfully submitted that plaintiffs' complaint herein fails to state a claim or cause of action and should be dismissed.

Affidavit of Service by Mail attached. [45]

[Endorsed]: Filed Oct. 1, 1952.

[Title of District Court and Cause No. 13922.]

MINUTES OF THE COURT

Date: Oct. 13, 1952, at Los Angeles, Calif.

Present: The Hon. Wm. C. Mathes, District Judge; Deputy Clerk: R. B. Clifton; Reporter: A. H. Bargion; Counsel for Plaintiff: Herbert S. Miller; Counsel for Defendants: Edw. R. McHale, Ass't U.S. Att'y.

Proceedings: For hearing on motion of defendants to dismiss, pursuant to notice of Oct. 1, 1952.

It is ordered that cause as to hearing on said motion is continued to Oct. 15, 1952, 1:30 p.m.

EDMUND L. SMITH,
Clerk

/s/ By R. E. CLIFTON,
Deputy Clerk [46]

[Title of District Court and Cause No. 13922.]

MINUTES OF THE COURT

Date: Oct. 15, 1952, at Los Angeles, Calif.

Present: The Hon. Wm. C. Mathes, District Judge; Deputy Clerk: S. W. Stacey; Reporter: A. H. Bargion; Counsel for Plaintiff: Herbert S. Miller; Counsel for Defendant: Edw. R. McHale, Ass't U.S. Att'y.

Proceedings: For hearing on motion of defendants to dismiss, pursuant to notice of Oct. 1, 1952. Court hears argument of counsel.

It is ordered that cause be submitted on said motion of defendants to dismiss.

EDMUND L. SMITH,
Clerk [60]

[Title of District Court and Cause No. 13922.]

MINUTES OF THE COURT

Date: Sept. 28, 1953, at Los Angeles, Calif.

Present: The Hon. Wm. C. Mathes, District Judge; Deputy Clerk: Edw. F. Drew; Reporter: A. H. Bargion; Counsel for Plaintiffs: no appearance; Counsel for Defendants: E. R. McHale, Att'y, Bur. Int. Rev.

Proceedings: For oral argument.

It is ordered, on motion of Att'y McHale, that cause is continued to Oct. 1, 1953, 10 a.m., for oral argument.

EDMUND L. SMITH,
Clerk [61]

[Title of District Court and Cause No. 13922.]

MINUTES OF THE COURT

Date: Oct. 1, 1953, at Los Angeles, Calif.

Present: The Hon. Wm. C. Mathes, District Judge; Deputy Clerk: Edw. F. Drew; Reporter: A. H. Bargion; Counsel for Plaintiffs: Herbert S. Miller; Counsel for Defendant: Edward R. McHale, Ass't U.S. Att'y.

Proceedings: For oral argument on motion to dismiss. Each of Attorneys McHale and Miller, respectively, makes a statement. Court makes a statement and orders cause as to motion to dismiss be submitted.

EDMUND L. SMITH,
Clerk [62]

[Title of District Court and Cause No. 13922.]

STIPULATION AND ORDER ALLOWING AMENDMENT OF COMPLAINT AND SUBMITTING THE MOTION TO DISMISS ON THE AMENDED COMPLAINT

It is hereby stipulated, by and between the parties hereto through their respective counsel of record, as follows:

1. That plaintiffs' complaint on file is hereby amended in the following particulars: that the punctuation period after the word "District" on line 26, page 4 of the complaint is hereby stricken and the

following language inserted: "and in fact had a reasonable chance at the end of the year 1938 to obtain said reimbursement and possibly a profit."

2. Motion to dismiss complaint and the memoranda in support of and in opposition thereto, with respect to the original complaint in this action shall be deemed to apply to the complaint as amended herein and the motion submitted to the Court.

Dated: At Los Angeles, California, this 24th day of October, 1952. [63]

BRAND, ROSENTHAL,
NORTON & MILLER,
/s/ By HERBERT S. MILLER,
Attorneys for Plaintiffs
WALTER S. BINNS,
United States Attorney
E. H. MITCHELL and
EDWARD R. McHALE,
Assistant U.S. Attorneys
EUGENE HARPOLE and
FRANK W. MAHONEY,
Special Attorneys, Bureau of
Internal Revenue,
/s/ EDWARD R. McHALE,
Attorneys for Defendants

It is so ordered this 27th day of October, 1952.

/s/ WM. C. MATHES,
Judge [64]

[Endorsed]: Filed Oct. 27, 1952.

[Title of District Court and Cause No. 13357.]

STIPULATION AND ORDER FOR SUBMITTING MOTION TO DISMISS AMENDED COMPLAINT ON MEMORANDA HERETOFORE FILED

It is hereby stipulated between plaintiff and defendant through their respective counsel of record as follows:

1. That the motion to dismiss the original complaint and the memoranda in support of and in opposition thereto be deemed to apply to the amended complaint, and that the matter be submitted to the Court on said motion and memoranda.

Dated: At Los Angeles, California, this 24th day of October, 1952.

BRAND, ROSENTHAL,
NORTON & MILLER,
/s/ By HERBERT S. MILLER,
Attorneys for Plaintiff
WALTER S. BINNS,
United States Attorney,
E. H. MITCHELL and
EDWARD R. McHALE,
Assistant U.S. Attorneys
EUGENE HARPOLE and
FRANK W. MAHONEY,
Special Attorneys, Bureau of
Internal Revenue
/s/ EDWARD R. McHALE,
Attorneys for Defendant

It is so ordered this 25th day of October, 1952.

/s/ WM. C. MATHES,
Judge [65]

[Endorsed]: Filed Oct. 27, 1952.

[Title of District Court and Cause No. 13922.]

ORDER ON MOTION TO DISMISS

This cause having come before the court for hearing on defendants' motion filed October 1, 1952 to dismiss the action; and the motion having been argued and submitted for decision;

It is now ordered that defendants' motion to dismiss the action is hereby denied.

It is further ordered that the Clerk this day serve copies of this order by United States mail on the attorneys for the parties appearing in this cause.

October 30, 1953.

/s/ WM. C. MATHES,
U.S. District Judge [66]

[Endorsed]: Filed Oct. 30, 1953.

[Title of District Court and Cause No. 13357.]

MEMORANDUM OF DECISION

Plaintiff brought this action to recover income taxes claimed to have been erroneously paid to defendant as Collector of Internal Revenue for the

calendar year 1946. Jurisdiction of this court is invoked under 28 U.S.C. § 1340. [See: Lowe Bros. Co. vs. United States, 304 U.S. 302, 305 (1938); Sage vs. United States, 250 U.S. 33, 37 (1919); 28 U.S.C. § 2006 and Reviser's Note fol. § 1346, 28 U.S.C.A. 154 (1950).]

The original complaint was dismissed upon motion for failure to state a claim or cause of action for which [67] relief could be granted [Fed. Rules Civ. Proc., Rules 8(a), 12(b)(6), 54(c), 28 U.S.C.A. 252, 336, 116 (1950)], and defendant now moves upon the same grounds to dismiss the amended complaint.

The material facts alleged in the amended complaint are briefly these. Prior to and on and after March 2, 1938 plaintiff was the owner of certain real property improved with two dwelling houses and other fixtures and furnished and equipped with various items of personalty. The total cost to plaintiff of the entire property so improved and equipped was $166,535, after deducting depreciation allowed and allowable. [See: Int. Rev. Code §§ 23(i), 113 (b), 26 U.S.C. §§ 23(i), 113(b), U. S. Treas. Reg. 111, § 29.23(i)-1, 26 CFR § 29.23(i)-1.]

It is next alleged that since prior to 1938 "plaintiff has been engaged in the business of constructing, furnishing, owning, operating and renting residential real estate"; and that at the time of the calamity later described one of the two dwelling houses in question was occupied by a paying tenant and the other by plaintiff in keeping with plaintiff's "business practice * * * to occupy residences in

order to more advantageously display such residences to prospective tenants or purchasers * * *"

Then follow allegations that on or about March 2, [68] 1938, "the Los Angeles River overflowed its banks * * * suddenly, and caused a flood which inundated plaintiff's said real estate * * * and entirely washed away and destroyed all * * * improvements * * * and all * * * personal property * * * and so damaged plaintiff's land * * * that the aggregate value * * * after said flood was only Four Thousand Dollars * * *." There is no mention of any insurance.

Plaintiff further alleges: that following the flood he "strongly believed and was advised by his attorneys that he could obtain reimbursement for the damages to his property by legal action against the Los Angeles County Flood Control District and in fact had a reasonable chance at the end of the year 1938 to obtain said reimbursement and possibly a profit"; that accordingly he filed a claim for $220,740 against the Flood Control District, which claim was denied; that he thereupon filed suit against the Flood Control District in the California Superior Court "and continuously and diligently prosecuted the case thereafter"; that the case went to trial by jury in 1946, and a verdict for $80,000 was returned in favor of plaintiff; that he "made no motion for a new trial, nor * * * attempt to secure any remedy other than judgment for the amount of said verdict"; that he "thereupon and at that time in the year 1946 abandoned all efforts to secure any recovery or reimbursement in excess of * * * $80,000

[69] represented by the verdict"; that the Superior Court, upon motion of the Flood Control District, set aside the verdict and ordered a new trial; that plaintiff appealed from the order granting a new trial, but the District Court of Appeal affirmed [Stone, et al. vs. Los Angeles County Flood Control District, 81 Cal. App. 2d 902, 185 P.2d 396 (1942)], the California Supreme Court refused plaintiff's petition for a hearing [id., 81 Cal. App. 2d at 912, 185 P.2d at 396] and the case was thereupon remanded for a new trial; that "in the year 1948, plaintiff executed an agreement of settlement * * * with the * * * Flood Control District," and his "net recovery in said settlement after attorneys' fees and court costs was * * * $8,403.05."

Plaintiff also alleges that he regularly filed his return and paid defendant the $13,400.67 income tax shown thereon for the calendar year 1946, without deducting any amount as a loss sustained during the taxable year 1946 by reason of the 1938 flood; that "his true income tax liability for the year 1946 was zero"; that the computations shown on his 1946 return were erroneous and the tax was erroneously collected by defendant because "abandonment by plaintiff in the year 1946 of his claim for reimbursement and/or the rendition of the jury verdict and Superior Court judgment for only $80,000 represented the sustaining of a loss by plaintiff in [70] that year * * * of at least $82,585 not reimbursed by insurance or otherwise * * *." [See: Int. Rev. Code § 23(e), 26 U.S.C. § 23(e).]

In conclusion it is alleged that in 1948 plaintiff

filed an amended return for 1946 "setting forth the correct tax liability as zero," along with a claim against defendant for a refund of the entire $13,400.67 tax theretofore paid defendant as plaintiff's 1946 tax; and that on or about March 13, 1950 the Commissioner of Internal Revenue rejected the claim in full. This action followed.

Section 23 of the Internal Revenue Code provides in part that: "In computing net income there shall be allowed as deductions: * * *

(e) In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise (1) if incurred in trade or business; or (2) if incurred in any transaction entered into for profit, though not connected with the trade or business; or (3) of property not connected with the trade or business, if the loss arises from fires, storms, * * * or other casualty, or from theft." [26 U.S.C. §23(e).]

The precise question presented by the motion to dismiss [71] at bar is whether, on the facts alleged in the amended complaint, the court could properly hold as a matter of law that any part of the loss suffered by plaintiff as a proximate consequence of the 1938 flood was "sustained during the taxable year" of 1946 [26 U.S.C. §§ 41, 48] "and not compensated for by insurance or otherwise," within the meaning of the quoted provisions of § 23(e). [Cf. Commissioner vs. Highway Trailer Co., 72 F.2d 913, 915 (dissenting opinion, 7th Cir. 1934), cer. denied, 293 U.S. 626 (1935).]

The applicable regulations of the Commissioner

[26 U.S.C. §§ 62, 3791] provide that: "In general losses for which an amount may be deducted from gross income must be evidenced by closed and completed transactions, fixed by identifiable events, bona fide and actually sustained during the taxable period for which allowed. Substance and not mere form will govern in determining deductible losses." [U.S. Treas. Reg. 111, § 29.23(e)-1(b), 26 CFR § 23(e)-1(b).]

These regulations, as the Court observed in Boehm vs. Commissioner, 326 U.S. 287, 291-292 (1945), have been "long continued without substantial change * * * and have the effect of law." [See e.g.: United States vs. White Dental Co., 274 U.S. 398 (1927); First Nat. Corp. vs. Commissioner, 147 F.2d 462 (9th Cir. 1945); Commissioner vs. Peterman, 118 F.2d 973 (9th Cir. 1941); Cahn vs. Commissioner, 92 F.2d [72] 674 (9th Cir. 1937).]

Defendant contends in support of the motion that destruction of plaintiff's property by flood was the "identifiable event" which fixed the time of plaintiff's loss, that the loss was admittedly not "compensated for by insurance or otherwise," and hence must be deemed "evidenced by [a] closed and complete transaction" within the meaning of the quoted regulations, since the alternative phrase "or otherwise" denotes, says defendant, nothing more or less than a consensual undertaking comparable to a contract of insurance, such as the unequivocal contractual obligation of some third person to reimburse the taxpayer in whole or in part.

In other words, the argument goes, the law in-

tends that both the taxpayer and the Government should know with certainty when a loss is deductible; that the purpose of the statute [26 U.S.C. § 23(e)] is to establish a predictable rule which both permits and requires the taxpayer in a case like that at bar to make the deduction for the year in which the "physical damage" occurs [see Commissioner vs. Highway Trailer Co., supra, 72 F.2d at 915], unless "compensated for" by insurance or other contract such as will permit of a deduction later for loss from "bad debts" within § 23(k) of the Internal Revenue Code [26 U.S.C. § 23(k)], in the event the insurer or other obligor should default and the taxpayer [73] thus fail in his efforts at recoupment. [Cf. John H. Farish & Co. vs. Commissioner, 31 F.2d 79, 81 (8th Cir. 1929); Farmers etc. Exchange vs. Commissioner, 10 B.T.A. 379, 381 (1928).]

Upon granting defendant's motion to dismiss the original complaint I was persuaded that this narrow construction of § 23(e) urged by defendant was sound both in reason and in policy, that the rule urged by defendant made for certainty and predictability for both the taxpayer and the Government and was, moreover, permissible under precedents which by stare decisis bind this court.

That holding was made "in the light of the now familiar rule that an income tax deduction is a matter of legislative grace * * * that the burden of clearly showing the right to the claimed deduction is on the taxpayer" [Interstate Transit Lines vs. Commissioner, 319 U.S. 590, 593 (1943)], and that

"only as there is clear provision therefor can any particular deduction be allowed." [New Colonial Ice Co. vs. Helvering, 292 U.S. 435, 440 (1934).]

However, further consideration of the problem in connection with the pending motion and the more recent decision in Alison vs. United States, 344 U.S. 167 (1952), have combined to convince me that it was error to grant defendant's [74] motion to dismiss the original complaint in this action.

Although Alison involved loss resulting from a concealed embezzlement, the rationale of the opinion and the implied reaffirmation of the rationale of Boehm vs. Commissioner, supra, 326 U.S. 287, serve to make the holding applicable in the case at bar. This is clearly so when Alison and Boehm are considered in the light of earlier pronouncements of the Court treating with kindred problems, keeping in mind differences existing from time to time in the scope of review of decisions of the Tax Court. [See: Dobson vs. Commissioner, 320 U.S. 489, 496-498, 501-502 (1943); 26 U.S.C. § 1141(a); Fed. Rules Civ. Proc., Rule 52, 28 U.S.C.A. 13 (1950); Arrowsmith vs. Commissioner, 344 U.S. 6, 12 (dissenting opinion, 1952).]

Thus it seems now to be settled that losses not evidenced by "closed and completed transactions," within the meaning of the regulations, must be held "compensated for by * * * or otherwise," within the meaning of § 23(e). [26 U.S.C. § 23(e); e.g. Alison vs. United States, supra, 344 U.S. 167 [Whitney vs. Commissioner, 13 T.C. 897 (1949).] The problem then is to determine in a given case

whether the loss in question is evidenced by a "closed and completed" transaction.

To be deductible, Mr. Justice Holmes wrote in Weiss [75] vs. Wiener, 279 U.S. 333, 335 (1929), "the loss must be actual and present, not merely contemplated as more or less sure to occur in the future." Thus the "mere existence of liability [on the part of the taxpayer] is not enough to establish a deductible loss." [Burnet vs. Huff, 288 U.S. 156, 160 (1933).]

Nor is the mere existence of an unsatisfied claim for recoupment in favor of the taxpayer enough to prevent the loss from being held deductible. In United States vs. White Dental Co., supra, 274 U.S. at 402-403, the court said: "The quoted regulations, consistently with the statute, contemplate that a loss may become complete enough for deduction without the taxpayer's establishing that there is no possibility of an eventual recoupment * * *. The Taxing Act does not require the taxpayer to be an incorrigible optimist. We need not attempt to say what constitutes a closed transaction evidencing loss in other situations. It is enough to justify the deduction here that the transaction causing the loss was completed when the seizure was made. It was none the less a deductible loss then, although later the German government bound itself to repay and an award was made by the Mixed Claims Commission which may result in a recovery."

The Court speaking through Mr. Justice Brandeis in Lucas vs. American Code Co., 280 U.S. 445, 449 (1930) explained and extended the rule in this

way: "Generally speaking, the [76] income-tax law is concerned only with realized losses, as with realized gains * * *. Exception is made however in the case of losses which are so reasonably certain in fact and ascertainable in amount as to justify their deduction, in certain circumstances, before they are absolutely realized. As respects losses occasioned by the taxpayer's breach of contract, no definite legal test is provided by the statute for the determination of the year in which the loss is to be deducted. The general requirement that losses be deducted in the year in which they are sustained calls for a practical, not a legal test." [Accord, Burnet vs. Huff, supra, 288 U.S. at 161; cf. Eckert vs. Burnet, 283 U.S. 140 (1931).]

Some ten years later, in Smith vs. Helvering, 141 F.2d 529, 531 (D.C. Cir. 1944), it was held that the proper test to be employed in determining whether a loss arising from worthless corporate stock has been sustained during a particular tax period is the subjective one.

The year following, in Boehm vs. Commissioner, 146 F.2d 553, 555 (2d Cir. 1945), the Court of Appeals for the Second Circuit "approved the objective rather than the subjective test," declaring: "In so far as Smith vs. Helvering * * * adopts the subjective test we must respectfully disagree with it." [77]

The Supreme Court granted certiorari in the Boehm case [325 U.S. 847 (1945)] and, upon affirming the decision of the Second Circuit, declared that "unmistakable phraseology [of § 23(e)] com-

pels the conclusion that a loss, to be deductible * * * must have been sustained in fact during the taxable year. And a determination of whether a loss was in fact sustained in a particular year cannot fairly be made by confining the trier of facts to an examination of the taxpayer's beliefs and actions. Such an issue of necessity requires a practical approach, all pertinent facts and circumstances being open to inspection and consideration regardless of their objective or subjective nature * * *. The standard for determining the year for deduction of a loss is thus a flexible, practical one, varying according to the circumstances of each case. The taxpayer's attitude and conduct are not to be ignored, but to codify them as the decisive factor in every case is to surround the clear language of § 23(e) and the Treasury interpretations with an atmosphere of unreality and to impose grave obstacles to efficient tax administration." [Boehm vs. Commissioner, supra, 326 U.S. at 292-293.]

The ratio decidendi of Boehm was in effect reaffirmed in Alison vs. United States, supra, 344 U.S. at 170, by the holding that: "Whether and when a deductible loss results * * * is a factual question * * * to be decided according to [78] surrounding circumstances."

As if to give emphasis to the "flexible" standard described in Boehm, the Court in Alison added the declaration that: "An inflexible rule is not needed: the statute does not compel it." [Ibid. See IRS Rev. Rul. 183, Sept. 14, 1953, 22 L.W. 2123 (1953).]

This "flexible, practical" standard ex necessitate

includes an objective test of the reasonableness of the taxpayer's action "according to the surrounding circumstances," since under our common-law system of justice the ultimate standard in the application of every rule is one of reasonableness. [See: Funk vs. United States, 290 U.S. 371, 383-385 (1933); Pound, The Spirit of the Common Law, 182-183 (1921); Pound, Justice According to Law, 60 (1951).]

Applied to a case like that at bar the test is whether or not, "according to the surrounding circumstances," the taxpayer acted or failed to act with "reasonable cause" — exercised "ordinary business care and prudence" — in considering and treating the claimed loss as "evidenced by [a] closed and completed transaction * * * fixed by [an] identifiable event * * * [and] bona fide and actually sustained during the taxable period" for which claimed as a deduction. [U.S. Treas. Reg. 111, § 25.23(e)-1(b), 26 CFR § 29.23(e)-1(b); [79] 2 Restatement, Torts, § 283 (1934); cf. U.S. Treas. Reg. 103, § 29.291-1, 26 CFR § 29.291-1; Note, 64 Harv. L. Rev. 345 (1950).]

"According to the surrounding circumstances" may encompass myriad criteria for guaging the reasonableness of the taxpayer's action or inaction, such as whether there was "an actual physical loss * * * resulting in a certain definite, fixed amount of damage" [see Commissioner vs. Highway Trailer Co., supra, 72 F.2d at 915; cf. Rhodes vs. Commissioner, 100 F.2d 966 (6th Cir. 1939)], and whether there was any other identifiable later event which

might reasonably be looked to in fixing the date of loss [e.g. Burnet vs. Huff, supra, 288 U.S. at 160-162; Lucas vs. American Code Co., supra, 280 U.S. at 449-450; Belser vs. Commissioner, 174 F.2d 387, 389-390 (4th Cir. 1949). And the taxpayer's "attitude and conduct are not to be ignored." [Boehm vs. Commissioner, supra, 326 U.S. at 293.]

In the light of these factors, "determination of the year of loss calls for * * * a consideration of all pertinent facts and circumstances, regardless of their objective or subjective nature." [Mine Hill etc. R. Co. vs. Smith, 184 F.2d 422, 426 (3d Cir. 1950); Acheson vs. Commissioner, 155 F.2d 369, 371 (5th Cir. 1946); Harral vs. United States, 81 F. Supp. 983, 986 (W. D. Tex. 1949).] [80]

Thus the statutory limitation that a deductible loss is not sustained if "compensated for by insurance or otherwise" places every reasonable possibility of recoupment among the "pertinent facts and circumstances." [United States vs. White Dental Co., supra, 274 U.S. at 402-403; First Nat. Corp. vs. Commissioner, supra, 147 F.2d at 464; Cahn vs. Commissioner, supra, 92 F.2d at 676; Douglas Co. L. & W. Co. vs. Commissioner, 43 F.2d 904, 905 (9th Cir. 1930); see: Commissioner vs. Harwick, 184 F.2d 835 (5th Cir. 1950); Boston Consol. Gas Co. vs. Commissioner, 128 F.2d 473, 476-477 (concurring opinion, 1st Cir. 1942); H.D. Lee Mercantile Co. vs. Commissioner, 79 F.2d 391 (10th Cir. 1935); Louisville Trust Co. vs. Glenn, 33 F. Supp. 403, 408 (W. D. Ky. 1940), aff'd, 124 F.2d 418 (6th Cir. 1942); George M. Still, Inc. vs. Commissioner,

19 T.C. 1072 (1953); Whitney vs. Commissioner, supra, 13 T.C. at 901; Paul and Mertons, 3 Law of Federal Income Taxation, § 26.54 (1934). Contra: Commissioner vs. Highway Trailer Co., supra, 72 F.2d at 915.]

The precise test then in a case such as that at bar is whether a reasonable taxpayer exercising ordinary business care and prudence would have treated the matter as a "closed and completed" transaction and claimed the deduction as a "realized loss" for the taxable year in which physical loss occurred, without regard to possible recoupment in some future year. [Compare H. D. Lee Mercantile Co. vs. Commissioner, supra, 79 F.2d at 393.] [81]

The taxpayer may not reasonably defer the deduction for loss until some more tax-advantageous year by pursuing a tenuous claim for recoupment. [Boehm vs. Commissioner, supra, 326 U.S. at 290-291, 293-295; Cahn vs. Commissioner, supra, 92 F.2d at 676; see: Clark vs. Welch, 140 F.2d 271, 273-274 (1st Cir. 1944); Jones vs. Commissioner, 103 F.2d 681, 685 (9th Cir. 1939); Hinrichs vs. Helvering, 95 F.2d 117 (D.C. Cir. 1938).] To paraphrase Mr. Chief Justice Stone's oft-quoted dictum in United States vs. White Dental Co., supra, 274 U.S. at 403, the law does not permit or require the taxpayer to be an incorrigible optimist. [See: Niagara Share Corp. vs. Commissioner, 82 F.2d 208, 211-212 (4th Cir. 1936); Commissioner vs. John Thatcher & Son, 76 F.2d 900, 902 (2d Cir. 1935); Commissioner vs. Highway Trailer Co., supra, 72 F.2d at 914-915.]

By the same token, the law does not permit or require the taxpayer to be an incorrigible pessimist. [See: Lucas vs. American Code Co., supra, 280 U.S. at 450; Acheson vs. Commissioner, supra, 155 F.2d at 371; First Nat. Corp. vs. Commissioner, supra, 147 F.2d at 464; Commissioner vs. Winthrop, 98 F.2d 74 (2d Cir. 1938); H. D. Lee Mercantile Co. vs. Commissioner, supra, 79 F.2d at 393; Inland Products Co. vs. Blair, 31 F.2d 867 (4th Cir. 1929); Whitney vs. Commissioner, supra, 13 T.C. at 901.]

Reasonable and good faith reliance upon the advice of counsel after full and fair disclosure of the facts by the taxpayer is a relevant factor in determining whether the taxpayer had reasonable cause to defer his claim of deduction while in pursuit of possible recoupment. [See: Cahn vs. Commissioner, supra, 92 F.2d at 676; cf. Haywood Lumber & Min. Co. vs. Commissioner, 178 F.2d 769, 771 (2d Cir. 1950); and see: 2 Restatement, Torts, §§ 283, 299(d) (1934); 1 Restatement, Agency, §§ 272-282 (1933); Note, 64 Harv. L. Rev., supra, at 347.

Accounting procedures followed by the taxpayer in transactions involved in the claim of loss and any claim for recoupment may be relevant where there is an issue as to good faith. [See: Commissioner vs. **Harwick**, supra, 184 F.2d 835; Commissioner vs. Peterman, supra, 118 F.2d at 976; cf. Lucas vs. American Code Co., supra, 280 U.S. at 451-452; Lewellyn vs. Electric Reduction Co., 275 U.S. 243, 245, 247 (1927).]

The fact that the taxpayer was successful in whole or in part in pursuing his claim for recoup-

ment is immaterial, if the deduction "in the year taken was based on the exercise of reasonable judgment from the facts then known." [Rhodes vs. Commissioner, supra, 100 F.2d at 970; see: Alison vs. United States, supra, 344 U.S. at 170; Boehm vs. Commissioner, [83] supra, 326 U.S. at 290-291; Commissioner vs. Winthrop, supra, 98 F.2d at 75-76.]

But since the taxpayer "cannot choose the year" [United States vs. Ludey, 274 U.S. 295, 304 (1927)], it is a material circumstance that a loss properly deductible for one taxable year may not be deducted for any later year. As Judge Healy put it in First Nat. Corp. vs. Commissioner, supra, 147 F.2d at 464: "If a taxpayer errs in failing to claim a permissible deduction the error can not be rectified by taking the deduction in a later year * * *. On the other hand a capital loss can not be claimed while there remains a reasonable possibly of recoupment. Losses, to be deductible, must in general be evidenced by completed transactions, fixed by identifiable events. The loss must, within reason, be final and irrevocable."

By parity of reasoning it is a material circumstance that any recoupment following deduction is taxable as ordinary income for the taxable year when received. [Burnet vs. Sanford & Brooks Co., 282 U.S. 359, 365 (1931); Rhodes vs. Commissioner, supra, 100 F.2d at 970.]

And it is the policy of the law, as declared by the Court of Appeals of this Circuit in Douglas Co. L. & W. Co. vs. Commissioner, supra, that: "Claimed

deductions for * * * [84] inchoate losses are not to be encouraged, and therefore the taxpayer ought not to be penalized for deferring his claim for deductions until he has in good faith resorted to reasonable measures for avoiding or minimizing a threatened loss." [43 F.2d at 905.]

Finally it is to be noted that while in case of doubt the tax statutes and regulations thereunder are "construed most strongly against the Government, and in favor of the citizen" [Gould vs. Gould, 245 U.S. 151, 153 (1917)], rulings of the Commissioner of Internal Revenue have "the support of a presumption of correctness" [Welch vs. Helvering, 290 U.S. 111, 115 (1933)], and the burden of proof is clearly upon the taxpayer to establish both the fact and the amount of a deductible loss. [Burnet vs. Houston, 283 U.S. 223, 227 (1931).]

Turning again to the precise question at bar—whether the amended complaint states "a claim upon which relief can be granted" [Fed. Rules Civ. Proc., Rule 12(b)(6), 28 U.S.C.A. 335 (1951)]—it is a material circumstance that under California law plaintiff's claim against the Flood Control District was a chose or "thing in action" which had value and was assignable. [Stapp vs. Madera Canal & Irr. Co., 34 Cal. App. 41, 166 Pac. 823 (1917); Cal. Civ. Code §§ 953, 954.] [85]

If then, as alleged in the amended complaint, plaintiff's physical assets in question, upon being destroyed or damaged in the 1938 flood, were converted ipso facto into a chose or "thing in action" of an amount equal to the diminution in value of

the physical assets destroyed or damaged as a proximate result of the flood, and plaintiff elected to pursue that claim to possible recoupment in later years, it cannot be said as a matter of law that plaintiff suffered in 1938 a loss "not compensated for by insurance or otherwise" within the meaning of § 23(e) of the Internal Revenue Code. [26 U.S.C. § 23(e); Alison vs. United States, supra, 344 U.S. at 170.]

In my opinion the allegations inter alia in the amended complaint that plaintiff "strongly believed and was advised by his attorneys that he could obtain reimbursement for the damages to his property by legal action against the Los Angeles County Flood Control District and in fact had a reasonable chance at the end of the year 1938 to obtain said reimbursement" sufficiently tender an issue of ultimate fact for trial by jury as plaintiff has demanded. [See: Reviser's Notes fol. 28 U.S.C. § 1346, 28 U.S.C.A. 154 (1950).]

The issue thus tendered is whether, in the light of all the surrounding circumstances, plaintiff exercised ordinary business care and prudence in delaying deduction [86] of loss until the taxable year 1946. [Cf. Reading Co. vs. Commissioner, 132 F.2d 306, 310 (3d Cir. 1942).]

This conclusion finds support in the rule that condition of mind may be averred generally [Fed. Rules Civ. Proc., Rule 9(b), 28 U.S.C.A. 316 (1950)], and the holding that the amount of the taxpayer's eventual recoupment is not determinative, but is only one of the surrounding circum-

stances. [Young vs. Commissioner, 123 F.2d 597, 600 (2d Cir. 1941); cf. Boehm vs. Commissioner, supra, 326 U.S. at 290-291, 294-295.]

Accordingly defendant's motion to dismiss the amended complaint is denied.

October 30, 1953.

/s/ WM. C. MATHES,
U.S. District Judge. [87]

[Endorsed]: Filed Oct. 30, 1953.

[Title of District Court and Cause No. 13922.]

ANSWER TO AMENDED COMPLAINT

Come now the defendants, and in answer to the amended complaint, admit, deny and allege:

First Cause of Action

I.

The allegations contained in paragraph I of the First Cause of Action of the amended complaint are admitted except that it is denied that the income taxes assessed and collected in such action were erroneously, wrongfully or illegally so assessed and collected and except that it is denied that the amount of such income taxes assessed and collected in such action was excessive in amount.

II.

The defendants are without information and knowledge sufficient to form a belief as to the truth

of the allegations contained in paragraph II of the First Cause of Action of the amended complaint and they are accordingly denied. [88]

III.

The allegations contained in paragraph III of the First Cause of Action are admitted.

IV.

The allegations contained in paragraph IV of the First Cause of Action are admitted.

V.

The defendants are without information and knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph V of the First Cause of Action of the amended complaint and they are accordingly denied.

VI.

The defendants are without information and knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph VI of the First Cause of Action of the amended complaint and they are accordingly denied.

VII.

The defendants are without information and knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph VII of the First Cause of Action of the amended complaint and they are accordingly denied.

VIII.

The defendants are without information and knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph VIII of the First Cause of Action of the amended complaint and they are accordingly denied.

IX.

The defendants are without information and knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph IX of the First Cause of Action of the amended complaint and they are accordingly denied.

X.

The defendants are without information and knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph X of the First Cause of Action of the amended complaint and they are accordingly denied, except that the second and unnumbered paragraph of said paragraph X is admitted. [89]

XI.

The allegations contained in paragraph XI of the First Cause of Action are admitted.

XII.

The defendants are without information and knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph XII of the First Cause of Action of the amended complaint and they are accordingly denied.

XIII.

The defendants are without information and knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph XIII of the First Cause of Action of the amended complaint and they are accordingly denied.

XIV.

The allegations contained in paragraph XIV of the First Cause of Action of the amended complaint are denied, except that it is admitted that an income tax deficiency for the calendar year 1948 was assessed against the plaintiffs in the amount of $16,043.95 together with interest thereon of $2,593.41, making a total of $18,637.36 which amounts were paid to the defendant Robert Riddell, Collector of Internal Revenue for the Sixth Collection District of California, on March 2, 1951 and May 11, 1951, respectively.

XV.

The allegations contained in paragraph XV of the First Cause of Action of the amended complaint are denied.

XVI.

The allegations contained in paragraph XVI of the First Cause of Action of the amended complaint are denied.

XVII

The allegations contained in paragraph XVII of the First Cause of Action of the amended complaint are denied, except that it is admitted that on or about August 14, 1951, the plaintiffs filed

with the defendant Robert Riddell, Collector of Internal Revenue for the Sixth Collection District of California, a claim for refund of income taxes paid for the calendar year 1948 in the [90] amount of $18,637.36 plus interest as prescribed by law, but each and every allegation contained in such claim for refund filed by the plaintiffs on August 14, 1951, for the calendar year 1948 is specifically denied, and it is further denied that said claim for refund sets forth substantially the same grounds as are set forth in the amended complaint.

XVIII.

The allegations contained in paragraph XVIII of the First Cause of Action are admitted.

XIX.

The allegations contained in paragraph XIX of the First Cause of Action are denied.

Second Cause of Action

I.

The allegations contained in paragraph I of the Second Cause of Action of the amended complaint are answered in the same manner as the allegations referred to therein were answered as and where they appeared in the First Cause of Action, respectively.

II.

The allegations contained in paragraph II of the Second Cause of Action of the amended complaint are admitted.

III.

The allegations contained in paragraph III of the Second Cause of Action of the amended complaint are denied, except that it is admitted that an income tax deficiency for the calendar year 1949 was assessed against the plaintiffs in the amount of $654.74 together with interest thereon of $46.20 making a total of $700.94, which amounts were paid to the defendant Robert Riddell on or about July 2, 1951.

IV.

The allegations contained in paragraph IV of the Second Cause of Action of the amended complaint are denied.

V.

The allegations contained in paragraph V of the Second Cause of Action [91] of the amended complaint are denied.

VI.

The allegations contained in paragraph VI of the Second Cause of Action of the amended complaint are denied, except that it is admitted that on or about August 24, 1951, the plaintiffs filed with the defendant Robert Riddell, Collector of Internal Revenue for the Sixth Collection District of California, their joint claim for refund for the calendar year 1949 in the amount of $5,951.20 plus interest as prescribed by law, but each and every allegation contained in such claim for refund filed by the plaintiffs on August 24, 1951 for the calendar year 1949 is specifically denied, and it is further denied that said claim for refund sets forth sub-

stantially the same grounds as are set forth in the amended complaint.

VII.

The allegations contained in paragraph VII of the Second Cause of Action of the amended complaint are admitted.

VIII.

The allegations contained in paragraph VIII of the Second Cause of Action of the amended complaint are denied.

Third Cause of Action

I.

The allegations contained in paragraph I of the Third Cause of Action of the amended complaint are answered in the same manner as the allegations referred to therein were answered as and where they appeared in the First Cause of Action, respectively.

II.

The allegations contained in paragraph II of the Third Cause of Action of the amended complaint are denied, except that it is admitted that on or about March 15, 1948, the plaintiff, Earl Callan filed with the defendant Harry C. Westover his income tax return for the calendar year 1947 showing thereon a net income of zero and he paid no income tax for the year 1947 at the time of filing said return.

III.

The allegations contained in paragraph III of the Third Cause of Action of the amended complaint

are denied, except that it is admitted that an income tax deficiency for the calendar year 1947 was assessed against the plaintiff Earl Callan in the amount of $14,044.67 together with interest thereon in the amount of $2,270.23 making a total of $16,-314.90, which amounts were paid to the defendant Robert Riddell on March 2, 1951 and on May 11, 1951, respectively.

IV.

The allegations contained in paragraph IV of the Third Cause of Action of the amended complaint are denied.

V.

The allegations contained in paragraph V of the Third Cause of Action of the amended complaint are denied.

VI.

The allegations contained in paragraph VI of the Third Cause of Action of the amended complaint are denied.

VII.

The allegations contained in paragraph VII of the Third Cause of Action of the amended complaint are denied, except that it is admitted that on or about August 14, 1951, the plaintiff Earl Callan filed with the defendant Robert Riddell a claim for refund for the calendar year 1947 in the amount of $16.314.90 together with interest thereon as prescribed by law, but each and every allegation contained in such claim for refund filed by the plaintiff Earl Callan on August 14, 1951, for the calendar year 1947 is specifically denied, and it is

further denied that said claim for refund sets forth substantially the same grounds as are set forth in the amended complaint.

VIII.

The allegations contained in paragraph VIII of the Third Cause of Action of the amended complaint are admitted.

IX.

The allegations contained in paragraph IX of the Third Cause of Action [93] of the amended complaint are denied.

Fourth Cause of Action

I.

The allegations contained in paragraph I of the Fourth Cause of Action of the amended complaint are answered in the same manner as the allegations referred to therein were answered as and where they appeared in the First Cause of Action, respectively.

II.

The defendants are without information and knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph II of the Fourth Cause of Action of the amended complaint and they are accordingly denied.

III.

The allegations contained in paragraph III of the Fourth Cause of Action of the amended complaint are denied, except that it is admitted that on or about March 15, 1947, the plaintiff Earl Callan

filed his income tax return for the calendar year 1946, with the defendant Harry C. Westover as Collector of Internal Revenue for the Sixth Collection District of California and except that it is admitted that on such return the plaintiff reported a net taxable income for the year 1946 of $32,-428.98 and a tax liability for such year of $13,-400.67, which amount of $13,400.67 the plaintiff Earl Callan paid on or before March 15, 1947 to the defendant Harry C. Westover as such Collector.

IV.

The allegations contained in paragraph IV of the Fourth Cause of Action of the amended complaint are denied.

V.

The allegations contained in paragraph V of the Fourth Cause of Action of the amended complaint are denied.

VI.

The allegations contained in paragraph VI of the Fourth Cause of Action of the amended complaint are denied, except that it is admitted that on or about August 14, 1951, the plaintiff Earl Callan filed with the defendant Robert Riddell, Collector of Internal Revenue for the Sixth Collection District [94] of California, a claim for refund of income taxes paid for the calendar year 1946 in the amount of $13,400.67, but each and every allegation contained in such claim for refund filed by the plaintiff Earl Callan for the calendar year 1946 on August 14, 1951, is specifically denied, and it is

further denied that said claim for refund sets forth substantially the same grounds as are set forth in the amended complaint.

VII.

The allegations contained in paragraph VII of the Fourth Cause of Action of the amended complaint are admitted.

IX.

The allegations contained in paragraph IX of the Fourth Cause of Action of the amended complaint are denied.

As a second, separate and further defense to each and every cause of action, these defendants state that each and every cause of action of the amended complaint should be dismissed because it fails to state a claim from which relief can be granted.

As a third, separate and alternative defense to each and every cause of action, these defendants state the amended complaint should be dismissed on the ground that this court lacks jurisdiction of the subject matter for the reason that the grounds for refund stated in the amended complaint are different grounds from those stated in the claims for refund filed.

As a fourth, separate and alternative defense, these defendants move the court to strike from each and every cause of action of Plaintiff's amended complaint the following redundant, immaterial and impertinent matter contained in Paragraph VII

of the First Cause of Action of the amended complaint and repeated and repleaded by reference in the Second and Third Causes of Action: [95]

"From and after the time of said flood and continuously thereafter during the year 1938, plaintiff strongly believed and was advised by his attorneys that he could obtain reimbursement for the damages to his property by legal action against the Los Angeles County Flood Control District and in fact had a reasonable chance at the end of the year 1938 to obtain said reimbursement and possibly a profit."

Wherefore, the defendants demand judgment that each of the four causes of action of the amended complaint be dismissed and that the defendants be awarded their lawful costs and disbursements herein.

LAUGHLIN E. WATERS,
United States Attorney
EDWARD R. McHALE and
ROBERT H. WYSHAK,
Asst. U. S. Attorneys,
EUGENE HARPOLE,
Special Attorney, Internal Revenue Service
/s/ EDWARD R. McHALE,
Attorneys for Defendants [96]

Affidavit of Service by Mail attached. [97]

[Endorsed]: Filed Nov. 18, 1953.

[Title of District Court and Cause No. 13922.]

STIPULATION OF ISSUES TO BE TRIED

It Is Hereby Stipulated, by and between the parties hereto, through their respective counsel of record, that following are the only issues remaining to be tried:

I. The Year of Loss

It is the contention of the plaintiffs in this action that for income tax purposes, plaintiff Earl Callan's loss originating from damage done by the March 2, 1938, flood was finally and entirely sustained by him in the year 1948 to the extent of the entire amount of such loss. It has been stipulated between plaintiffs and defendant, that, except for any loss which may be held to be properly sustained and deductible in the year 1938, all other loss, if any, which may be held to be sustained by plaintiff Earl Callan shall be deemed to be loss sustained by plaintiff in the year 1948. [98]

Plaintiff contends that none of plaintiff's loss was sustained or deductible in the year 1938. Defendant contends that all of the plaintiff's loss was properly sustained and deductible in the year 1938.

II. The Character of the Loss

If the decision on the first issue is for plaintiff, that the loss was sustained and deductible in 1948, then with reference to each of the following respective portions of plaintiff Earl Callan's loss which

originated from the flood damage to the following classes of assets located at 1740 Riverside Drive, was such portion of his loss attributable to the operation of a business which he, Earl Callan, regularly carried on:

(a) Land at 1740 Riverside Drive?

(b) Buildings and improvements at 1740 Riverside Drive?

(c) Furniture and furnishings at 1740 Riverside Drive?

This determination is necessary under the applicable provisions of Section 122 (d)(5) of the Internal Revenue Code to determine under Local Rule 7(h) the amount, if any, of net operating loss determined for the year 1948 which would become available as a net operating loss carryback to the year 1946.

Defendant contends that each portion of said loss was not attributable to the operation of a business regularly carried on by Earl Callan and, therefore not allowable for net operating loss purposes under Section 122 (d)(5) except to the extent of gross income of plaintiffs not derived from a trade or business.

The issue as to each of the above portions shall be determined separately and entirely. [99]

Dated: January 28, 1955.

/s/ HERBERT S. MILLER,
Attorney for Plaintiffs
LAUGHLIN E. WATERS,
United States Attorney

EDWARD R. McHALE,
Asst. U. S. Attorney, Chief, Tax Division
/s/ EDWARD R. McHALE,
Attorneys for Defendants [100]

[Endorsed]: Filed Jan. 28, 1955.

[Title of District Court and Cause No. 13922.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto, through their respective counsel of record, without prejudice to the rights of any party herein to introduce additional evidence not inconsistent herewith, and without prejudice to their right to object to the materiality or irrelevancy of any of the facts agreed to, as follows:

I.

This is an action for refund of income taxes for the years 1948 under Paragraph XVI,B, Plaintiffs' Secondary Position, First Cause of Action, and for 1946 under the Fourth Cause of Action, by plaintiffs Earl and Helen Callan, who were husband and wife during those years. All other issues raised by the pleadings in No. 13357 and all other issues raised by the pleadings in the other positions and Causes of Action in No. 13922 have, in effect, been removed as issues by this stipulation.

For the year 1948 they filed a joint income tax

return, and, therefore, the claimed loss deduction which relates in some aspects to physical events occurring in 1938, if allowed, will serve to reduce Earl and Helen Callans' joint income taxes for 1948, and may serve to reduce them for 1946. However, for the purposes of convenience in this stipulation, and because Earl and Helen Callan were not married until 1941, reference in this stipulation hereafter to "plaintiff" or "taxpayer" will be to Earl Callan, whose property was damaged. The plaintiff Helen Callan herself owned no property damaged or destroyed by the 1938 flood. In the event of any recovery for plaintiffs as a result of this action, it shall be allocated to both of them as is proper under the internal revenue laws, in view of their having filed a joint income tax return for 1948.

II.

At all times herein mentioned, plaintiffs were and now are residents of the City of Los Angeles, County of Los Angeles, State of California; that the said place of residence is in the Central Division of the United States District Court in and for the Southern District of California.

III.

On February 27, 1938, and at all times thereafter which are material to this action, plaintiff Earl Callan was the owner of an undivided one-half interest, and no more, in the real estate commonly known as 1740 Riverside Drive, Los Angeles, California, and 1723 Rancho, Los Angeles, California,

together with all improvements, fixtures and appurtenances to said real estate.

IV.

For all purposes of this stipulation, the term "adjusted cost basis," as used herein, shall mean the amount allowable to plaintiff under the internal revenue and income tax laws of the United States as his cost, net after subtraction for depreciation allowed or allowable, for purpose of income tax reporting of transactions and events concerning the respective properties and assets for which such adjusted cost bases are hereinafter stipulated.

V.

At the time of the flood hereinafter referred to, plaintiff had the following respective adjusted cost basis for his said undivided one-half interest in the following properties and assets:

Land at 1740 Riverside Drive—One-half of $11,125.00, or		$ 5,562.50
Improvements, fixtures and appurtenances to the real estate at 1740 Riverside Dr.		24,345.00
$24,345.00, or one-half of $48,690.00 consisting of an undivided one-half of each of the following:		
Landscaping, wall and pumps	$ 4,500.00	
Another wall and entrance	5,872.50	
Swimming pool and dressing rooms	1,800.00	
House	36,517.50	
	$48.690.00	
Total for land and improvements, fixtures and appurtenances at 1740 Riverside Drive, one-half of $59,-815.00, or		$ 29,907.50

VI.

Plaintiff was the sole and separate owner of furniture and furnishings which were located at 1740 Riverside Drive at the time of the flood hereinafter referred to, and that at such time said plaintiff's adjusted cost basis for such furniture and furnishings was $40,765.00.

VII.

Plaintiff owned as his separate property an undivided one-half of various personal clothing, personal jewelry, personal effects and other personal non-business property, which was located primarily on the second floor of the residence building at 1740 Riverside Drive at the time of the flood hereinafter referred to, and that at such time plaintiff's adjusted cost basis for such undivided one-half of said personal clothing, personal jewelry, personal effects and other personal non-business property, was one-half of $7,710.00, or $3,855.00.

VIII.

At the time of the flood hereinafter referred to, plaintiff owned as his separate property, an undivided one-half interest in, and for each such respective undivided interest had the following respective adjusted cost bases for the following properties:

Land at 1723 Rancho, one-half of $5,160.00, or.....$ 2,580.00
consisting of an undivided one-half of each of the following:
Original cost .....$ 3,000.00

Landscaping, Street work, and sprinklers, driveway, and patio improvements	2,160.00	
	$ 5,160.00	
Swimming pool, walls and buildings located on said real estate at 1723 Rancho, one-half of $21,384.00, or		$ 10,692.00
consisting of an undivided one-half of each of the following:		
Swimming pool and dressing room	$ 4,320.00	
Stables	3,150.00	
House	13,914.00	
Total for real estate at 1723 Rancho, as itemized above, one-half of $26,544.00, or		$ 13,272.00

IX.

Plaintiff owned an undivided one-half interest in personal property which was situated at 1723 Rancho at the time of the flood hereinafter referred to and for which at such time, for such undivided interest, he had the following respective adjusted cost bases:

Oriental Rug (½ of $1,350.00) or	$ 675.00
Domestic Rug (½ of $75.00 or)	37.50
Bar and Mirror (½ of $67.50 or)	33.75
Eight (8) Spanish Posters (½ of $486.00) or	243.00
Total (½ of $1,978.50 or)	$ 989.25

At and immediately prior to the time of such flood, the fair market value of plaintiff's interest in each and everyone of the assets described in the stipulation was at least as great as and no greater than the respective adjusted cost basis of plaintiff herein stipulated for his interest in such asset.

X.

On or about the 2nd day of March, 1938, the Los Angeles River overflowed its banks and levees and its normal channel, suddenly, and caused a flood which inundated plaintiff's said real estate at 1723 Rancho and 1740 Riverside Drive and entirely washed away and destroyed all the plaintiff's said swimming pool, walls, buildings, and other real estate improvements, furniture, furnishings, personal clothing, personal jewelry, personal effects and all other personal property at 1740 Riverside Drive and 1723 Rancho, and so damaged plaintiff's property at said locations that the aggregate value of plaintiff's undivided one-half interest in said lands after the flood was only one-half of $4,000.00 or $2,000.00; and that, of said $2,000.00 the value after said flood of the land at 1723 Rancho was $500.00 and that the value of the land at 1740 Riverside Drive was $1,500.00.

XI.

From and at all times after the time of said flood, plaintiff had no insurance or other right to reimbursement for damages caused to his property and assets by said flood, except his rights, if any, against the Los Angeles County Flood Control District.

XII.

On or about May 31, 1938, plaintiff filed a claim against and with said Los Angeles County Flood Control District in the amount of Two Hundred Twenty Thousand Seven Hundred Forty Dollars

($220,740.00), for the purpose of obtaining reimbursement for his aforesaid damages, in addition to other damages sustained by him by reason of said flood. This claim was denied by the Los Angeles County Flood Control District in December 1938. Plaintiff thereupon commenced and, continuously until the time of filing suit, prosecuted preparation and work for the purpose of filing suit for such reimbursement. Plaintiff filed suit in the Superior Court in and for the County of Los Angeles against said Los Angeles County Flood Control District in February, 1939, and continuously and diligently prosecuted the case thereafter. The case was tried before the jury of the Superior Court in and for the County of Los Angeles in the year 1946. In its charge to the Jury the Court instructed the jury with respect to damages in the event that it found the Los Angeles County Flood Control District negligent that the defendant is liable only for the damage approximately caused by its removal of certain protection works from the Los Angeles River and that said defendant is not liable for damages, if any, which would have occurred if said protection works and natural repairing growth had not been removed. The jury brought back a verdict for plaintiff in the amount of $80,000.00. Plaintiff made no motion for a new trial, nor did plaintiff attempt to secure any remedy other than judgment for the amount of said verdict.

XIII.

Said Superior Court entered a judgment in favor

of plaintiff Earl Callan in the amount of $80,000.00 on or about March 27, 1946. The defendant, Los Angeles County Flood Control District filed a motion for a new trial which was granted by said Superior Court on or about May 16, 1946, on the grounds that there was insufficient evidence to justify the verdict of the jury, and the judgment based thereon. Plaintiff in the year 1946 appealed from said Order of the Superior Court granting a new trial to the California District Court of Appeals and the California District Court of Appeals affirmed said order for new trial on October 17, 1947. On December 15, 1947, the Supreme Court of California refused to grant a hearing on plaintiff's appeal from said decision of said District Court of Appeals and the case was remanded to the Superior Court in and for the County of Los Angeles for a complete new trial. The new trial ordered was never held and in the year 1948, plaintiff executed an agreement of settlement and release with the Los Angeles County Flood Control District. Plaintiff's net recovery in said settlement after attorneys' fees and court costs was in the amount of $8,403.05, minus $4,201.53 paid by him to his former wife, or a net recovery to plaintiff of $4,201.53.

XIV.

The amounts alleged by plaintiff to be the taxable net income of plaintiff for each taxable year, before deduction of any part of the loss (or net operating losses, including carrybacks and carryovers) which plaintiff in this action claims as deductible losses, including carrybacks and carry-

overs) in computing his correct taxable income for the respective years by reason of the allegations of the complaint in this action, are the correct taxable net income of plaintiff for such years before subtracting any such deductions.

XV.

Plaintiff's correct net taxable income for each year is the respective amount stipulated in paragraph 13 above minus such amount, if any, found in this action to be deductible, and plus or minus any corollary adjustments provided by Federal internal revenue laws.

XVI.

Plaintiff's true income tax liability for each taxable year in this action should be computed upon the correct net taxable income for such year and that such computation shall be made pursuant to Rule 7(h) of the Federal Rules of Civil Procedure upon determination of the other issues in this action.

XVII.

At such times as plaintiffs have alleged concerning the respective refund claims, plaintiff or plaintiffs alleged in the respective causes of action herein, duly filed with the Collector of Internal Revenue for the Sixth District of California, the defendant Riddell, the respective claims for refund for the respective taxable years in this action in the respective amounts alleged by plaintiffs, with such amended returns and schedules attached and incorporated in said claim, as plaintiffs have al-

leged, claiming the respective plaintiff's or plaintiffs' correct tax liability for such respective years to be in amounts alleged in the complaint, and setting forth as the grounds substantially the same grounds as are set forth in the complaint, as amended herein, for each respective taxable year.

XVIII.

Defendant refuses to refund to plaintiff or plaintiffs the sums demanded in the aforesaid claims for refund, or any portion thereof, for any of the respective taxable years.

XIX.

Earl Callan for the calendar year 1938 duly filed his income tax return. Plaintiff did not deduct upon his 1938 income tax return any part of the loss which plaintiff alleges in this action to have been sustained in any later year or deductible in any later year. Said return reported all his income and deductions with said exception, which deductions were sufficient to disclose upon said return a net loss of approximately $1,700, and therefore, no tax payable for said year.

XX.

The parties reserve all rights of objection and exception on appeal, to the extent such rights exist by law in absence of the stipulation, concerning the verdict, finding of fact, or ruling of law in this action which relates to a holding that the flood damage to plaintiff's property from 1938 was not for income tax purposes a loss properly sustained and deductible in the year 1938.

Subject to the foregoing reservation,

It is hereby stipulation and agreed between the parties that, except for any loss which may be held to be properly in the year 1938 all other loss, if any, which may be held to be sustained by plaintiff shall be deemed to be loss sustained by plaintiff in the year 1948.

The amount of such loss, if any, deductible for the year 1948 as to each asset, shall be the difference between (a) plaintiff's hereinabove stipulated basis for his interest in such assets at the time of said flood, minus any above-stipulated value for his interest in such asset immediately after said flood, and minus (b) the proportionate part of plaintiff's stipulated total net recovery of $4,201.53 in the year 1948. The proportionate part of such recovery allocable to each asset shall be the amount determined under (a) for such asset divided by the total of all amounts determined under (a) for all assets and multiplied by $4,201.53.

XXI.

The parties reserve all rights of objection and exception and appeal, to the extent such rights exist by law in the absence of the stipulation, concerning any verdict, finding of fact or ruling of law in this action, which relates to a holding that any loss deduction for the year 1948 as to any asset damage in said flood was or was not a loss of same in plaintiff's trade or business. In the event any loss is determined with respect to the year 1948, the parties

will compute the amount of the judgment pursuant to Local Rule 7(h) of this Court.

XXII.

In computing net operating loss carrybacks and carryovers, if any, the following classes of income of taxpayer shall be considered as gross income not derived from a trade or business:

(a) dividends; (b) interest; (c) royalties; (d) gains and losses upon the capital gains and loss schedule of taxpayer's returns.

All other income reported by taxpayer in his return shall be considered as gross income derived from the trade or business computing net operating loss carrybacks or carryovers for deductions in other years, if any.

XXIII.

The income tax deficiency for the calendar year 1948 was assessed against the plaintiffs in the principal amount of $16,043.95, together with interest in the sum of $2,593.41, or a total of $18,637.36 which was paid by plaintiffs under protest, to the defendant Robert Riddell, on February 5, 1951.

XXIV.

Any computations under Local Rule 7(h) which may become necessary as a result of a judgment entered in this action shall be based upon the following Federal income tax returns and revenue agent's reports which shall be admitted into evidence and for this purpose:

(1) Income tax return for the year 1946 of Helen

Wahl Callan, bearing stamp "Received March 13, 1947";

(2) Original income tax return for the calendar year 1946 of Earl Callan, bearing stamp "Received March 13, 1947";

(3) Amended Federal income tax return of Earl Callan for the calendar year 1946, bearing stamp "Received, March 15, 1948";

(4) Joint income tax return of Earl and Helen Callan, for the calendar year 1948, bearing stamp "Received, March 14, 1949";

(5) Revenue agent's report of O. R. Anderson, with respect to Earl and Helen Callan for the year 1948, dated August 18, 1950.

XXV

For the purpose of computing deductions for net operating loss purposes under Internal Revenue Code, Section 122(d)(5), the loss of plaintiff Earl Callan, originating from the damage and destruction of the property at 1723 Rancho, including the real estate, improvements, furniture and furnishings, is attributable to the operation of a business which plaintiff Earl Callan regularly carried on.

Dated: This 27 day of January, 1955.

/s/ HERBERT S. MILLER,
Attorney for Plaintiffs.

LAUGHLIN E. WATERS,
United States Attorney,

EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division,
/s/ EDWARD R. McHALE,
Attorneys for Defendants.

[Endorsed]: Filed Jan. 28, 1955.

[Title of District Court and Cause No. 13922.]

DEFENDANTS' REQUEST FOR INSTRUCTIONS

Come now the defendants, Robert Riddell and Harry C. Westover, by and through their attorneys, Laughlin E. Waters, United States Attorney, and Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, and request the Court that Instructions number 1 to 15, hereto attached, be given the jury impaneled to try the above entitled cause.

Dated: This 8th day of February, 1955.

LAUGHLIN E. WATERS,
United States Attorney,

EDWARD R. McHALE,
Asst. U. S. Attorney,
Chief, Tax Division,

/s/ EDWARD R. McHALE,
Attorneys for Defendants. [101]

General Civil Instructions of Judge Mathes

Civil Nos. 1, 2, 2B-(Modified—using the word "Government" in place of "Corporation").

3, 4, 5, 6, 9, 15, 16, 16-B, 18, 20-B—as modified in accordance with the form of the special verdict.

Instruction No. 1

There are two possible issues before you for decision; first, whether plaintiffs sustained a loss deductible in 1948 by reason of the March 2, 1938 flood which destroyed the premises at 1740 Riverside Drive, together with building, improvements, furniture and furnishings. Only if you find for the plaintiff on the first issue will it be necessary for you to decide the second which is whether the destruction of the 1740 Riverside Drive property together with furniture and furnishings by the March 2, 1938 flood gave rise to a casualty loss, as defendant contends, or a loss attributable to an operation of a business which Earl Callan regularly carried on, as plaintiff contends.

If you find for the plaintiff on any part of the second issue, you must separately decide the character of the loss with respect to:

(a) land at 1740 Riverside Drive,

(b) buildings and improvements at 1740 Riverside Drive,

(c) furniture and furnishings at 1740 Riverside Drive.

If you find the loss deductible in 1948, your determination as to the character of the loss will deter-

mine whether any part of it is available to the plaintiffs and can be carried back to reduce Earl Callan's 1946 taxes under the net operating loss provisions of the law. [103]

Instruction No. 2

The rejection of plaintiffs' refund claims for overpayment of taxes for the years 1948 and 1946 was made by the Commissioner of Internal Revenue, whose act in rejecting those refund claims is presumed to be correct, and, before plaintiffs are entitled to a refund of any part of any income tax paid by them for the calendar year 1948 or 1946, there must be established by a preponderance of evidence that the Commissioner's action in rejecting those claims was erroneous.

Callan v. Westover, 116 F. Supp. 191, 200 [20-22].

Welch v. Helvering, (1933) 290 U. S. 111, 115.

Instruction No. 3

An income tax deduction is a matter of legislative grace and the burden of clearly showing the right to the claimed deduction is on the plaintiffs.

Callan v. Westover, 116 F. Supp. 191, 196 [1-3].

Interstate Transit Lines v. Commissioner, 319 U. S. 590, 593 (1943). [105]

Instruction No. 4

You are to determine whether plaintiff Earl Callan's claim for reimbursement against the Los An-

geles County Flood Control District for damages due to claimed negligence by the District and which had been denied by the District at the close of 1938 was "compensation by insurance or otherwise" and thus served to postpone the loss until the amount thereof, if any, was finally determined, as plaintiffs contend, or whether said claims for damages were too contingent and uncertain to be treated as compensation by insurance or otherwise for the loss, as defendants contend.

Commissioner v. John Thatcher and Sons, 76 F. 2d 900, 902 (2 Cir., 1935). [106]

Instruction No. 5

The loss of plaintiff Earl Callan was deductible in the year it was evidenced by a closed and completed transaction fixed by an identifiable event and bona fide and actually sustained during the taxable period.

Callan v. Westover, 116 F. Supp. 191, 198.

United States Treas. Reg. 111, Section 29.23 (e)-1(b), 26 CFR Section 29.23(e)-1(b).

Instruction No. 6

Among the factors to be taken into consideration by you in determining when plaintiffs' loss occurred is when the physical damage was sustained.

Commissioner v. Highway Trailer Co., 72 F. 2d 913 (7 Cir., 1934) cert. den. 293 U. S. 626. [108]

Instruction No. 7

The mere existence of an unsatisfied claim for

recovery against the Los Angeles County Flood Control District in favor of the taxpayer is not enough to prevent the loss from being held deductible in 1938.

Callan v. Westover, 116 F. Supp. 191, 196 (7).
United States v. S. S. White Dental Co., 274 U.S. 398, 402. [109]

Instruction No. 8

The taxpayer may not reasonably defer the deduction for loss until some more tax advantageous year by pursuing a tenuous claim for recovery against the Los Angeles Flood Control District.

Callan v. Westover, 116 F. Supp. 191, 198 [11] and cases cited. [110]

Instruction No. 9

You are to determine whether Earl Callan delayed deducting the loss to a year later than 1938 for reasons other than business care and prudence, such as effecting a tax benefit which otherwise would have been useless to him, because plaintiffs are not allowed to pick and choose the year of loss principally to effect the most advantageous tax benefit.

Callan vs. Westover, 116 F.Supp. 191, 199 [15-17].
United States v. Ludey (1927), 274 U. S. 295, 304. [111]

Instruction No. 10

You are to take into account in determining the reasonableness of plaintiff's inaction in not deducting the flood loss in 1938, whether he had net tax-

able income in 1938 against which to offset it, and whether he can be said to have a tax reason for taking the loss in later years. [112]

Instruction No. 11

If a taxpayer deducts his loss in the year of physical destruction and a claim for reimbursement is allowed in a later year by court action or otherwise, the amount reimbursed does not escape tax and the Government does not lose revenue, because the later recover of reimbursement for the earlier loss is included in taxable income in the year of reimbursement to the extent the taxpayer received a tax benefit by the earlier loss deduction.

Callan v. Westover, 116 F. Supp. 191, 199 [18].

Burnet v. Sanford & Brooks Co. (1931), 282 U.S. 359, 365. [113]

* * * * *

Acknowledgment of Service attached. [118]

[Endorsed]: Filed Feb. 8, 1955.

[Title of District Court and Causes 13357, 13922.]

MINUTES OF THE COURT

Date: Feb. 8, 1955, at Los Angeles, Calif. (Same Order in each case.)

Present: Hon. Wm. C. Mathes, District Judge; Deputy Clerk: Edw. F. Drew, 10 a.m.; C. A. Seitz, 3:15 p.m.; Reporter: Don P. Cram; Counsel for Plaintiffs: Herbert S. Miller; Counsel for Defendants: Edw. R. McHale, Ass't U. S. Att'y.

Proceedings: For jury trial on joint trial of the issues.

Attorney McHale makes a statement and moves to dismiss Case No. 13,357-WM Civil. Attorney Miller makes a statement re said motion. Court Orders said motion denied and that Case No. 13,-357-WM trial Case No. 13,922-WM.

Court Orders that a jury be impaneled and trial proceed in Case No. 13,922-WM.

The following jurors, duly impaneled, are sworn to try this cause: 1. Myrtle M. Fewster; 2. Ralph J. Jacoby; 3. John G. Iler; 4. Lloyd W. Oldfield; 5. Grace P. Abbott; 6. David J. Gittleson; 7. Mayer M. Baran; 8. Gertrude H. Kittner; 9. Alice M. Nuttall; 10. Esther B. Rappaport; 11. Kenneth A. Saunderson; 12. Ida Sokol. Alternate Juror: Doyle F. Ziegler.

Attorney Miller makes opening statement to jury in behalf of plaintiffs.

Attorney McHale makes opening statement to jury in behalf of defendants.

At 10:55 a.m. Court admonishes the jurors not to discuss this cause and declares a recess. At 11:10 a.m. court reconvenes herein, and all being present as before, including the jury and alternate juror, and counsel so stipulating.

Earl Callan is called, sworn, and testifies for plaintiffs.

Plfs' Ex. 1-A through 1-H, 2-A through 2-E, 3, 4-A through 4-G, 5-A through 5-G, 6, 7-A through 7-D, are admitted in evidence.

Plf's Ex. 33 (Stipulation of facts filed Jan. 28, 1955) is admitted in evid.

At noon Court reminds the jurors of the admonition heretofore given and declares a recess. At 2 p.m. court reconvenes herein, and all being present as before, including jury and alternate juror, and counsel so stipulating;

Earl Callan resumes testimony in behalf of plaintiff.

Filed defendants' requested jury instructions.

Plf's Ex. 8, 9-A, 9-B, 10, 11, 12, 13, and 14 are admitted in evidence.

At 3 p.m. Court reminds the jurors of the admonition heretofore given and declares a recess. At 3:15 p.m. court reconvenes herein, and all being present as before, including the jury and alternate juror, and counsel so stipulating;

Plf's Ex. 15-A through 15-D are received in evidence.

Plf's Ex. 16 is marked for ident.

Court permits counsel to approach the bench, and out of hearing of the jury, counsel stipulates as to Flood Control System, and counsel withdraw Ex. 16 from evidence.

Plf's Ex. 17 through 32, and 34 through 37, are received in evidence.

At 4:10 p.m. Court admonishes the jurors not to discuss this cause and Orders cause continued to Feb. 9, 1955, 10 a.m., for further jury trial.

EDMUND L. SMITH,
Clerk [119]

[Title of District Court and Cause No. 13922.]

MINUTES OF THE COURT

Date: Feb. 9, 1955, at Los Angeles, Calif.

Present: The Honorable Wm. C. Mathes, District Judge; Deputy Clerk: C. A. Seitz; Reporter: Don P. Cram; Counsel for Plaintiff: Herbert S. Miller; Counsel for Defendant: Edw. R. McHale, Ass't U. S. Att'y.

Proceedings: For further jury trial. At 10:20 a.m. court convenes herein, and plaintiff Earl Callan being present, and jury and alternate juror being present, Court orders trial proceed.

The following witnesses are sworn and testify on behalf of Plaintiff: Earl Callan, Harold O. Wright, Michael A. Vargo, Henry M. Lee.

Both sides rest.

At 2:45 p.m. the jury retires, and out of hearing of the jury, Gov't moves for a directed verdict and reserves right of motion thereof, and it is so ordered.

Gov't moves for judgment of acquittal or dismissal on the ground that plaintiffs have shown no grounds for relief. Court denies both motions.

At 2:50 p.m. the jury returns into court.

Court admonishes the jurors not to discuss this cause and excuses them until 9:30 a.m., Feb. 10, 1955. In the absence of the jurors Court and counsel discuss proposed instructions and verdict.

It Is Ordered that further jury trial is continued to 9:30 a.m., Feb. 10, 1955.

EDMUND L. SMITH, Clerk [120]

[Title of District Court and Cause No. 13922.]

MINUTES OF THE COURT

Date: Feb. 10, 1955, at Los Angeles, Calif.

Present: Hon. Wm. C. Mathes, District Judge; Deputy Clerk: C. A. Seitz; Reporter: Don P. Cram; Counsel for Plaintiff: Herbert S. Miller; Counsel for Defendant: Edw. R. McHale, Ass't U. S. Att'y.

Proceedings: For further jury trial. At 9:40 a.m. court convenes herein. It is stipulated and the jury is absent. Court orders trial proceed.

Court and counsel discuss proposed instructions to the jury.

At 10:20 a.m. the jury and alternate juror return into court, and counsel stipulating that the jurors are present, Court orders trial proceed.

Attorney Miller argues to the jury; Attorney McHale argues to the jury; and Attorney Miller argues further to the jury.

At 11 a.m. Court admonishes the jurors not to discuss this cause and declares a recess to 11:10 a.m.

At 11:10 a.m. court reconvenes herein, and all being present as before, except the jury and alternate juror, and counsel stipulating that the jurors are absent, Court orders counsel to proceed.

Court and counsel discuss proposed instructions to the jury.

At 11:15 a.m. Court instructs the jury.

At 11:40 a.m. Court reminds the jurors of the

admonition heretofore given and excuses them. It is stipulated that the jurors are absent.

Court and counsel discuss proposed instructions.

At 11:55 a.m. the jury and alternate juror return into court, and counsel stipulating that the jurors are present, Court orders counsel proceed.

Floyd O. Strong and Elizabeth Bazar are sworn as bailiffs to care for the jury, and Court orders that the jurors be taken to lunch. At 12:20 p.m. the jurors and two bailiffs retire from the Court room.

At 1:50 p.m. the jury and alternate juror return to the jury room and resume deliberation upon a verdict.

At 4:35 p.m. court reconvenes herein, and all being present as before, including counsel for both sides and the jury.

The jury returns its Verdict in open court and said verdict is read by the clerk and ordered filed and entered, to wit: (See Verdict following:)

Court orders the jury discharged, and excused until notified.

Court instructs counsel to present judgment on the verdict in Case No. 13,922-WM and judgment of dismissal in Case No. 13,351-WM on Feb. 14, 1955.

EDMUND L. SMITH,
Clerk [123]

[Title of District Court and Cause No. 13357.]

STIPULATION AND ORDER FOR DISMISSAL WITH PREJUDICE

It Is Hereby Stipulated, by and between the parties hereto, through their respective counsel of record, that the above action may be, and is hereby, dismissed with prejudice, without costs to either party.

Dated: This 15th day of February, 1955.

/s/ HERBERT S. MILLER,
Attorney for Plaintiff

LAUGHLIN E. WATERS,
United States Attorney

EDWARD R. McHALE,
Asst. U. S. Attorney, Chief, Tax Division

/s/ EDWARD R. McHALE,
Attorneys for Defendant

It Is So Ordered this 16th day of February, 1955.

/s/ WM. C. MATHES,
United States District Judge [155]

[Endorsed]: Judgment Entered and Filed Feb. 16, 1955.

In the District Court of the United States, Southern District of California, Central Division

No. 13922-WM—Civil

EARL CALLAN and HELEN W. CALLAN,
Plaintiffs,

vs.

ROBERT RIDDELL and HARRY C. WESTOVER,
Defendants.

JUDGMENT

Pursuant to the pleadings of the parties, the Stipulation of Facts filed January 28, 1955, by the parties, and the Stipulation of Issues to be Tried by the parties filed on January 28, 1955, this cause came on for trial before the Court and a jury duly impaneled on the 8th day of February, 1955, for the trial of issues set forth in a form of Special Verdict [Fed. Rules Civ. Proc., Rule 49(a)] stipulated by the parties to this action through their counsel of record; Herbert S. Miller, Esq. appearing as counsel for plaintiffs, and Laughlin E. Waters, United States Attorney for the Southern District of California, and Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, for said District, appearing as counsel for the defendants; and the trial having commenced on the 8th day of February, 1955, before the Court and said jury, and during the trial of said cause, testimony having [156] been adduced on the part of plaintiff by plaintiffs' witnesses, and by defendants through cross-examination of plaintiffs' witnesses, and exhibits admitted on behalf of the respective parties,

and said testimony and exhibits and trial having continued to and including the 9th day of February, 1955; and the parties having rested on the 9th day of February, 1955, and motions of defendants for dismissal under Fed. R. Civ. P. 41(b) and for a directed verdict under Fed. R. Civ. P. 50(a) having been timely made and denied, and renewed at the close of the case and denied, the trial was continued to the 10th day of February, 1955, and the respective counsel having argued to the jury on the 10th day of February, 1955, the Court thereafter instructed the jury on the 10th day of February, 1955; and

On the 10th day of February, 1955, after the instructions of the Court, said cause was submitted to the jury for its consideration and verdicts upon the issues set forth in said stipulated form of verdicts; and after consideration thereof, the jury thereafter on said 10th day of February, 1955, having returned into court, and after presenting its verdicts, which were read by the Court, the Court ordered the verdicts as presented and read, filed and entered, and is as follows: [157]

[Title of District Court and Cause No. 13922-WM.]

SPECIAL VERDICT

We, the Jury in the above-entitled cause, unanimously find the answer to Question No. 1, to-wit:

Question 1: "Was plaintiff Earl Callan's loss from the March 2, 1938 flood finally and entirely sustained and deductible by him in 1938 or 1948?"

Answers: (1938) No; (1948) Yes.

(If the first question is answered "1938," question No. 2 need not be answered.)

(If question No. 1 is answered "1948", then you must answer each part of question No. 2 "Yes" or "No".)

We, the Jury in the above-entitled cause, unanimously find the answer to Question No. 2, to-wit:

Question 2: "Was any portion of Earl Callan's loss attributable to the operation of a business regularly carried on by him on March 2, 1938, at 1740 Riverside Drive with respect to the following property there located:

(a) "To the land?"

Answers: (No).....; (Yes) Yes.

(b) "To the buildings and improvements?"

Answers: (No) ....; (Yes) Yes.

(c) "To the furniture and furnishings?"

Answers: (No) No; (Yes) .....

Dated this 10th day of February, 1955.

/s/ Kenneth R. Saunderson,
Foreman of the Jury [158]

And, the parties having under Local Rule 7(h) stipulated as to the computation of the amount of the judgment to be entered, said stipulation having been filed herein,

Now Therefore by virtue of the law and by reason of the premises aforesaid,

It Is Hereby Ordered, Adjudged and Decreed:

That the plaintiffs, Earl Callan and Helen W. Callan, do have and receive from Robert A. Riddell, Collector of Internal Revenue, the sum of Eighteen Thousand Six Hundred Thirty Seven and

36/100 Dollars ($18,637.36) and interest thereon at the rate of six per centum per annum thereon from February 5, 1951, until a date preceding payment by not more than thirty (30) days, such date to be determined by the Commissioner of Internal Revenue of the United States, together with their costs to be taxed by the Clerk of this Court in the sum of $....., and

It Is Hereby Further Ordered, Adjudged and Decreed:

That the plaintiff Earl Callan do have and receive from defendant Harry C. Westover, former Collector of Internal Revenue, the sum of Four Thousand Seven Hundred Fifteen and 59/100 Dollars ($4,715.59) and interest thereon at the rate of six per centum per annum, from March 15, 1949, until a date preceding payment by not more than 30 days, such date to be determined by the Commissioner of Internal Revenue of the United States.

Dated this 16th day of February, 1955.

/s/ WM. C. MATHES,
United States District Judge

Approved as to Form pursuant to Local Rule 7(a) this 16th day of February, 1955.

/s/ Herbert S. Miller, Attorney for Plaintiffs.
Laughlin E. Waters, U. S. Attorney
Edward R. McHale, Asst. U. S. Attorney, Chief Tax Division
/s/ Edward R. McHale, Attorneys for Defendants

[Endorsed]: Judgment Entered and Filed Feb. 16, 1955.

[Title of District Court and Cause No. 13922.]

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT TO THE CONTRARY, OR IN THE ALTERNATIVE, MOTION FOR PARTIAL NEW TRIAL

Defendants, Harry C. Westover and Robert Riddell, through their counsel for record, move the Court as follows:

I. For an order setting aside Special Verdicts to Question No. 1, Question No. 2(a) and Question No. 2(b), and setting aside judgment heretofore entered in the above entitled action and for judgment in accordance with their previous motions for directed verdicts on the grounds that the Court erred in denying the motion of defendants for directed verdicts for the following reasons:

A. With respect to the Special Verdict on Question No. 1, under the facts and the law, the loss of plaintiffs was final and completely sustained, fixed and known in amount, and the property was physically destroyed, in the year 1938, and the loss was not reimbursed or reimbursable by insurance or otherwise.

B. With respect to the Special Verdicts on Questions No. 2(a) and 2(b), on the facts and the law, it clearly appears that [160] the property at 1740 Riverside Drive, land, buildings and improvements, were used by plaintiff, Earl Callan, as the personal residence of himself and family up to the time of the flood, and that he had abandoned it as

such or he had not evidenced an intent to abandon as such, both elements of abandoning being necessary before said property or either portion thereof, can be treated as property used in a business regularly carried on by him for net operating loss purposes.

C. With respect to Special Verdicts on Questions No. 2(a) and 2(b), under the law the net operating loss provisions of the Internal Revenue Code are not available to plaintiffs, because the loss occurred in 1938 and only was postponed to 1948 because of the finding of the jury, in effect, that it was reimbursed in 1948, and thus sustained in 1948, whereas, the provisions of the Internal Revenue Code permitting the carry-back of net operating loss of businesses regularly carried on were not in effect in 1938, and when later enacted, were made specifically inapplicable to years prior to 1939.

D. With respect to Special Verdicts on Questions No. 2(a) and 2(b), the verdicts are contrary to instruction 13-A, in that the evidence clearly and undisputedly shows occupancy of the property by Earl Callan as a residence, which reason for occupancy is either other than, or additional to, occupancy for business operational purposes, and for that reason, judgment entered on said questions is erroneous and should be set aside and entered for defendants.

II. In the alternative, defendants move the Court to set aside the Special Verdict with respect to Questions No. 1, No. 2(a) and No. 2(b) and

grant a new trial of this action as to said questions only on the following grounds:

A. Insufficiency of the evidence to justify the verdict or judgment thereon, in the following respects: [161]

1. With respect to the Special Verdict on Question No. 1, the weight of the evidence clearly shows that the loss was completely sustained and deductible in 1938 and not reimbursed by insurance or otherwise and the jury verdict is contrary to the weight of the evidence and erroneous.

2. With respect to Questions No. 2(a) and 2(b) the evidence undisputedly shows that Earl Callan and his wife used the property at 1740 Riverside Drive as a residence up to the time of the flood and had not intended to abandon it as such or had not in fact abandoned it as such at the time of the flood and thus, it could not be property used in a business regularly carried on by Earl Callan, and the jury verdict is contrary to the evidence and erroneous.

3. With respect to Special Verdicts on Questions No. 2(a) and 2(b) the evidence incontrovertibly shows that Earl Callan and his household occupied the property as his residence up to the time of the flood, which reason for occupancy is either other than, or additional to, occupancy for business operational purposes, and for that reason, verdict for plaintiffs on said questions is contrary to the Court's Instruction 13-A, and the evidence is insufficient to support said verdicts.

B. Errors in law occurring at the trial:

1. The giving of the instructions objected to by the defendants, Numbers 11, sentence commencing line 8, 11-A, [162] first paragraph and sub-parts (2), (3) and (4), first paragraph of 12, 13, fourth paragraph of 14, and the additional comments and instructions of the Court, objected and excepted to just before the jury retired, bearing on Question No. 1, with respect to the year the loss was sustained and deductible.

2. The failure to give instructions requested by the defendants, Numbers 4, 5, 12, 13, 14, 15, 18, 19, 20.

Dated: February 21, 1955.

LAUGHLIN E. WATERS,
United States Attorney

EDWARD R. McHALE,
Asst. U. S. Attorney, Chief, Tax Division

/s/ EDWARD R. McHALE,
Attorneys for Defendants [163]

[Endorsed]: Filed February 21, 1955.

[Title of District Court and Cause No. 13922.]

ORDER DENYING DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT TO THE CONTRARY, AND DENYING DEFENDANTS' ALTERNATIVE MOTION FOR PARTIAL NEW TRIAL

This cause came on to be heard upon a motion of the defendants for an order setting aside Special Verdicts to Question No. 1, Question No. 2(a) and Question 2(b), heretofore rendered by the jury in this cause, and setting aside judgment heretofore entered in this cause and for judgment in accordance with defendants' previous motions for directed verdicts, and also upon an alternative motion of the defendants to set aside said Special Verdict with respect to said Questions No. 1, No. 2(a) and No. 2(b) and to grant a new trial of this action as to said questions only.

Defendants and plaintiffs have each submitted memoranda with respect to their respective positions concerning said motions, and have each waived oral argument thereon.

The court has considered each of said motions, and is of the opinion that each of said motions should be overruled.

It is therefore ordered that the motions of the defendants [168] for an order setting aside Special Verdicts to Questions No. 1, Question No. 2(a) and Question 2(b) and setting aside judgment hereto-

fore entered in this cause and for judgment in accordance with defendants' previous motions for directed verdicts, and defendants' alternative motion to set aside said Special Verdict with respect to said Questions No. 1, No. 2(a) and No. 2(b), and to grant a new trial of this action as to said questions only, be and they are overruled and denied.

Ordered, this the 5th day of March, 1955.

/s/ WM. C. MATHES,
United States District Judge

Approved as to form March 3, 1955:

/s/ Herbert S. Miller, Attorney for Plaintiffs.
Laughlin E. Waters, U. S. Attorney; Edward R. McHale, Asst. U. S. Attorney, Chief, Tax Division. Signed by Edward R. McHale, Attorneys for Defendants. [169]

Affidavit of Service by Mail attached. [170]

[Endorsed]: Filed March 7, 1955.

[Title of District Court and Cause No. 13922.]

NOTICE OF APPEAL

To the Above Named Plaintiffs and to Their Attorney, Herbert S. Miller, 250 South Beverly Drive, Beverly Hills, California:

You, and Each of You, Are Hereby Advised that the defendants, Robert Riddell and Harry C. Westover, do hereby appeal to the United States Court

of Appeals for the Ninth Circuit from the final judgment entered February 16, 1955, in the above action.

Dated: This 15th day of April, 1955.

LAUGHLIN E. WATERS,
United States Attorney
EDWARD R. McHALE,
Asst. U. S. Attorney, Chief, Tax Division
/s/ EDWARD R. McHALE,
Attorneys for Defendants [171]

Affidavit of Service by Mail attached. [172]

[Endorsed]: Filed April 15, 1955.

[Title of District Court and Cause No. 13922.]

MOTION FOR EXTENSION OF TIME TO DOCKET CAUSE ON APPEAL AND ORDER

Comes Now the defendants-appellants, and move the Court to extend the time to docket the above entitled appeal from the final judgment entered February 16, 1955, 50 days under Federal Rule of Civil Procedure 73(g) for the reason that the Solicitor General of the United States has not yet determined whether an appeal should be taken.

Dated: This 20th day of May, 1955.

LAUGHLIN E. WATERS,
United States Attorney

EDWARD R. McHALE,
Asst. U. S. Attorney, Chief, Tax Division

ROBERT H. WYSHAK,
Asst. U. S. Attorney

/s/ ROBERT H. WYSHAK,
Attorneys for Defendants-Appellants [173]

ORDER

Good Cause Appearing Therefor:

It Is Hereby Ordered that the time within which to file the record and docket the above entitled appeal from the final judgment in favor of plaintiffs entered February 16, 1955, in the United States Court of Appeals for the Ninth Circuit be, and the same hereby is, extended to and including July 14, 1955.

Dated: May 20, 1955.

/s/ LEON R. YANKWICH,
United States District Judge

Presented by:

/s/ Robert H. Wyshak, Asst. U. S. Attorney

Affidavit of Service by Mail attached. [175]

[Endorsed]: Filed May 20, 1955.

[Title of District Court and Cause No. 13922.]

APPELLANTS' STATEMENT OF POINTS

Come Now the appellants, Robert Riddell and Harry C. Westover, pursuant to Rule 75 of the Federal Rules of Civil Procedure, and state that they intend to rely upon the following points in the appeal of the above entitled case:

1. The District Court erred in denying appellants' motion to dismiss the amended complaint;

2. The District Court erred in denying appellants' motion for directed verdicts on question No. 1;

3. The District Court erred in instructing the jury (Tr. lines 14-19), to wit:

"The law permitted plaintiff Earl Callan nonetheless to delay claiming a tax deduction for the loss while pursuing his claim against the Flood Control District, if [179] to do so would be the exercise of ordinary business care and prudence under all the surrounding circumstances."

4. The District Court erred in instructing the jury (Tr. 52, lines 2-10), to-wit:

"If the jury should find from the evidence, as plaintiffs contend, that plaintiff Earl Callan did exercise ordinary business care and prudence in delaying deduction of the loss in question for income tax purposes until his claim against the Los Angeles County Flood Control District was finally settled in 1948, then the jury should find that the loss for income tax purposes was not finally and

entirely sustained, and so did not become properly deductible, until the year of settlement—the year 1948."

5. The District Court erred in instructing the jury (Tr. 54, lines 19-23), to-wit:

"* * * you have two years here, 1938 and 1948, and if you find that the plaintiff exercised reasonable care, business care and prudence in postponing the loss until 1948, he is entitled to deduct it whether this is a residential property or a business property."

6. The District Court erred in submitting to the jury the question (Tr. 58-59), to-wit:

"Question 1: 'Was plaintiff Earl Callan's loss from the March 2, 1938 flood finally and entirely sustained and deductible by him in 1938 or 1948?'"

7. The District Court erred in instructing the jury (Tr. 59, lines 7-11), to-wit:

"So, you are called upon to find, under the instructions, whether plaintiff Earl Callan acted with reasonable business care and prudence in postponing claiming the deduction from 1938 when the physical loss occurred [180] until 1948 until after he settled his claim finally with the Flood Control District."

8. The District Court erred in leaving the issue as to the year in which the loss is deductible to the jury as a question of fact, and in instructing the jury that they should consider, along with other surrounding circumstances: the date of the physical loss; and whether the taxpayer made a full and fair disclosure of the facts to an attorney and

thereafter reasonably and in good faith followed and relied upon his advice; and the success or lack of success of the prosecution of his tort claim; and whether the taxpayer prosecuted his tort claim in good faith that he had a reasonable chance of recovery.

9. The District Court erred in not instructing the jury that where, as in this case, a physical loss has occurred which is not compensated for by insurance, the fact that the taxpayer asserts a disputed tort claim does not postpone the year in which the loss is to be taken; that a disputed tort claim is too contingent to warrant such postponement.

10. The District Court erred in not directing a verdict for the defendants on the issue as to the year in which the loss is deductible.

11. The District Court erred in not directing the jury to find that the loss is deductible only for 1938.

12. The District Court erred in not granting defendants' motion for judgment notwithstanding the verdict and for partial new trial.

13. The District Court erred in entering judgment for the plaintiffs.

14. The District Court erred in denying defendants' motion for judgment of dismissal under Rule 41(b) at the close of plaintiffs' case. (Tr. 7, February 9, 1955). [181]

15. The District Court erred in failing to give defendants' proposed instruction No. 4.

16. The District Court erred in failing to give defendants' proposed instruction No. 5.

Dated: July 1, 1955.

LAUGHLIN E. WATERS,
United States Attorney
EDWARD R. McHALE,
Asst. U. S. Attorney, Chief, Tax Division
/s/ EDWARD R. McHALE,
Attorneys for Defendants-Appellants [182]

[Endorsed]: Filed July 1, 1955.

[Title of District Court and Cause No. 13922.]

ACKNOWLEDGMENT OF RECEIPT OF SERVICE

Receipt of service of the following documents is hereby acknowledged:

1. Appellants' Designation of Contents of Record on Appeal; and

2. Appellants' Statement of Points to be Relied Upon on Appeal.

Dated: July 1, 1955.

HERBERT S. MILLER,
/s/ By HERBERT S. MILLER,
Attorney for Plaintiffs-Appellees [183]

[Endorsed]: Filed July 5, 1955.

[Title of District Court and Cause No. 13922.]

STIPULATION REGARDING CONTENTS OF RECORD ON APPEAL

It Is Hereby Stipulated and Agreed by and between the parties hereto, through their respective counsel of record, without prejudice to any of the other rights of the parties in this action, that there shall be excluded from the contents of the record on the appeal herein:

1. Defendants' Request for Instructions No. 16 and 17, filed February 9, 1955; and

2. Page 20, line 7 through Page 22, line 17, both inclusive, and Page 31, line 6 through Page 42, line 4, both inclusive, of the 63 page Reporter's Partial Transcript of Proceedings, February 9 and 10, 1955; and

3. The Amended Complaint for Recovery of Taxes and Interest in Case No. 13357-WM, Earl Callan Plaintiff vs. Harry C. Westover, Defendant; and it is hereby stipulated that, with respect [184] to the issues on appeal herein, said Amended Complaint in Case No. 13357-WM is substantially the same, in all particulars material to this appeal, as the Amended Complaint of Plaintiffs herein.

Dated: September 11, 1955.

LAUGHLIN E. WATERS,
United States Attorney
EDWARD R. McHALE,
Asst. U. S. Attorney, Chief, Tax Division

/s/ EDWARD R. McHALE,
Attorneys for Defendants and Appellants

/s/ HERBERT S. MILLER,
Attorneys for Plaintiffs and Appellees [185]

[Endorsed]: Filed July 11, 1955.

[Title of District Court and Cause No. 13922.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 187, inclusive, contain the original

Complaint for Recovery;

Notice of Motion to Dismiss;

Order on Defendants' Motion to Dismiss;

Notice of Motion and Motion to Dismiss;

Amended Complaint for Recovery of Taxes and Interest (13357-WM);

Stipulation and Order Allowing Amendment of Complaint;

Stipulation and Order for Submitting Motion to Dismiss, etc.;

Order on Motion to Dismiss;

Memorandum of Decision (13357-WM);

Answer to Amended Complaint;

Stipulation of Issues to be Tried;

Defendants' Request for Instructions; 1 through 15, incl.;

Instructions 16 and 17;

Instructions to the Jury;

Special Verdict;

Certificate of Probable Cause;

Stipulation and Order for Dismissal with Prejudice;

Judgment;

Motion for Judgment Notwithstanding Verdict to the Contrary, etc.;

Order Denying Defendants' Motion for Judgment Notwithstanding, etc.;

Notice of Appeal;

Motion for Extension of Time to Docket Cause on Appeal;

Appellants' Designation of Contents of Record on Appeal;

Appellants' Statement of Points to be Relied Upon on Appeal;

Acknowledgment of Receipt of Service;

Stipulation Regarding Contents of Record on Appeal;

Appellees' Designation of Contents of Record on Appeal; which, together with a full, true and correct copy of the Minutes of the Court on June 11, 1952, Oct. 13, 1952, Oct. 15, 1952, Sept. 28, 1953, Oct. 1, 1953, Feb. 8, 1955, Feb. 9, 1955 and Feb. 10, 1955; and two vols. of Reporter's Transcript of Proceedings on Feb. 9 and 10, 1955 (one with pages 1-14 and one with pages 1-63); one vol. of Reporter's Transcript of Proceedings on Feb. 10, 1955

(pages 1 to 17); together with Plaintiffs' exhibit 33; all in said cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fee for preparing the foregoing record amount to $2.00, the sum of which has not been paid.

Witness my hand and the seal of said District Court, this 12th day of July, 1955.

[Seal] JOHN A. CHILDRESS,
Clerk

In the United States District Court for the Southern District of California, Central Division

No. 13922-WM Civil

EARL CALLAN and HELEN W. CALLAN,
Plaintiffs,

vs.

ROBERT RIDDELL, Etc., Defendant.

TRANSCRIPT OF PROCEEDINGS
(Partial)
Los Angeles, California, February 9, 1955

Honorable William C. Mathes, Judge Presiding.

Appearances: For the Plaintiffs: Herbert S. Miller, 250 So. Beverly Dr., Beverly Hills, Calif. For the Defendant: Laughlin E. Waters, United States Attorney, by Edward R. McHale, Ass't U. S. Attorney.

The Court: Is it stipulated, gentlemen, the jury is absent?

Mr. McHale: So stipulated, your Honor.

Mr. Miller: So stipulated, your Honor.

The Court: This is a hearing pursuant to Rule 51 of the Federal Rules of Civil Procedure. Rule 51 provides that at the close of the evidence or at such earlier time during the trial as the Court reasonably directs, any party may file written requests that the Court instruct the jury on the law as set forth in the requests. The Court shall inform counsel of its proposed action upon requests prior to their argument to the jury. The Court will instruct the jury after the arguments are completed. No party may assign as error the giving or failure to give an instruction unless he objects to before the jury retires to consider its verdict, saying distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Now, it is my practice, gentlemen, to save sending the jury out needlessly before the case is given to them, that after I have completed the instructions, to turn to counsel and ask if counsel on either side have any matter to take up before the jury retires, and if both of you say no, that you have nothing to take up, I will consider that you do not have any objection that you wish to record to the instructions in the absence of the jury and will not excuse the jury, but will give them the case and permit them to retire to deliberate forthwith upon their verdict.

Is that procedure agreeable to both of you?

Mr. Miller: Yes, Your Honor.

Mr. McHale: Yes, Your Honor. I want to state to the Court that I understand your Honor has, so to speak, made the law on the case in his opinion heretofore and I am going to make exceptions just to preserve the record in this case.

The Court: Then I will plan to excuse the jury before giving them the final instructions. Then either of you may record any objection at that time which you have to the instructions.

Now, each of you has a copy of the instructions, with the exception of those on the second issue, as to whether or not the property was used primarily for business purposes.

As to those instructions, I will advise you orally and will give you copies by tomorrow morning of the instructions I propose to give. I will advise you orally now, however, so that you may be informed well in advance of the arguments. As to the others, a copy of which you have, that is the Court's proposal, the Court's proposed action on your request.

Now, I will hear any suggestion that either of you has or objection, criticism of any instruction that I propose to give, or whether it can be properly eliminated. That is always an admirable thing to do. Instructions in every case are far too long, I think.

Mr. Miller: If the Court please, I will make a few comments.

The Court: What is the first number you have some question about?

Mr. Miller: Instruction 11(b), your Honor.

The Court: Do you have 11(c)?

Mr. Miller: Yes, I also have 11(c).

The Court: 11(c) should probably be considered in connection with 11(b).

Mr. McHale: Your Honor, I seem to have two copies of 11(c) which are somewhat different.

The Court: Very well. One reads, "The mere existence of an unsatisfied claim * * *"

Mr. Miller: That is 11(b), your Honor.

The Court: It is now.

Mr. McHale: No. I have two copies of 11(c) that are somewhat alike, but I think perhaps one was an earlier draft because it isn't as clear as the other.

The Court: Very well.

Mr. McHale: They are not quite alike, but they are essentially the same thing.

The Court: The latest addition ends in 1948.

Mr. McHale: Yes. I assumed the other one was an earlier draft.

The Court: You may hand it to the clerk. It is probably an earlier draft.

What is your objection to 11(b), Mr. Miller?

Mr. Miller: Your Honor, the words, "The mere existence of an unsatisfied claim for recovery against the Los Angeles County Flood Control District is not enough to prevent the loss from being deducted in 1938 * * *" It seems to me——

The Court: "* * * is not enough in itself," I suppose it should be.

Mr. Miller: This was more than a claim. There was testimony about a claim being filed as a preceding condition to the suit that was brought there.

The Court: That is an unsatisfied claim even though it is in litigation, isn't it?

Mr. Miller: I think the jury might construe the word "claim" to refer to the fact that there was a claimed filed and it was denied by the County, which is not the whole substance of the stipulated rights that——

The Court: Well, we might put, "The mere existence of a claim or a suit for recovery * * *"

"Mere existence of a claim against or a suit for recovery * * *"

Mr. Miller: Could we say, Your Honor, "an insubstantial" or "unsubstantial"?

The Court: You don't want to say it is an "unsubstantial claim," do you? That refers to amount. The amount is of no importance, is it?

Mr. Miller: This is just the problem——

The Court: Substance on the merits.

"The mere existence of a claim or suit for recovery * * *" if you want.

Mr. Miller: "Without substantial possibilities of success." Isn't that correct, your Honor? Isn't that what the intent of the instruction is, or am I wrong?

The Court: It is like saying in a negligence action the mere happening of the accident does not prove the negligence. Or the mere existence of a claim or suit for recovery against the Los Angeles County Flood Control District is not enough in itself—in and of itself——

Mr. Miller: Yes, that would be all right.

The Court: How would that be?

Mr. Miller: That would be all right.

The Court: "* * * to prevent the loss from being deductible only in the year 1938."

I suppose it is clear enough just to say "deductible."

Now, any other objection to 11(b)?

Mr. Miller: Well, in connection with the next paragraph, which says, "By pursuing unreasonably a claim for recovery against the Flood Control District," seems to me that might be inferred by the jury as a statement by the Court that the taxpayer was pursuing an unreasonable claim by reason of the fact that the Flood Control District is specifically named.

The Court: Let's see if we can't improve that first sentence.

"Is not in and of itself", it seems to me it might be better to say it affirmatively—"It is not enough in and of itself to warrant the postponement of the deduction to some years subsequent to 1938——"

"——to some later year subsequent to 1938."

Mr. Miller: All that counsel for plaintiff has in mind with reference to that paragraph, your Honor, is that it not be construed by the jury as a statement by the Court that all the——

The Court: Now, you are talking about the second paragraph. I am still on the first one. I have your point about the——

Mr. Miller: In other words, as long as the jury understands that if the taxpayer has a substantial claim that he may recover on, that it is enough to warrant the postponement of the loss. That, your Honor, I think would be satisfactory. But the state-

ment of an instruction that because there was only a lawsuit, it is obvious all the plaintiff had a lawsuit to recover——

The Court: "Not enough in and of itself."

Mr. Miller: It must be a good one, in other words.

The Court: It doesn't even have to be a good one. You don't want me to tell them it has to be a good one. The plaintiff in good faith believes it is a good one; he reasonably and in good faith believes it.

Mr. Miller: That is right.

The Court: He believes it is meritorious.

What do you think of changing that first sentence?

That's taken from one of your requests.

Mr. McHale: Yes, your Honor; which was taken from your Honor's opinion, practically.

The Court: Do you gentlemen think the jury will understand if we say, "The mere existence of a claim or suit for recovery against the Los Angeles County Flood Control District is not in and of itself to prevent loss from being deductible in 1938"?

Mr. Miller: I think, your Honor, if the order of the instruction were changed to place it as a part of Instruction 11(a), between the first and second paragraphs of 11(a), that paragraph as written would be satisfactory.

The Court: Let's don't bother 11(a) unless we have to. That means a great deal more stenographic work, and those are all differences of opinion.

Mr. McHale: I think the paragraph is clear, your Honor.

The Court: Very well.

Then the next paragraph reads, "The taxpayer may not reasonably defer the deduction for loss until some more tax-advantageous year by pursuing unreasonably a claim for reimbursement for his loss."

Does that meet your objection, Mr. Miller?

Mr. Miller: Yes, your Honor.

The Court: "A claim for possible reimbursement of his loss"—reimbursement of his loss.

Mr. Miller: "For his damage."

The Court: "For his loss," isn't it?

Mr. Miller: For tax purposes I thought your Honor ruled in a previous opinion it was not closed and completed loss until the action for reimbursement had been determined.

The Court: It may or may not be. It depends upon whether the claim for reimbursement is one that can reasonably be precluded under the circumstances, such as to warrant keeping the claim open.

I didn't set up this standard. The Supreme Court —I had another view until I—as you know,——

Mr. McHale: Yes, your Honor, I know.

The Court: It seems to me this is a very unpredictable standard that is unsatisfactory both to the Government and the taxpayer. "Claim for possible reimbursement for his loss."

Then is the third paragraph of 11(b) all right?

Mr. Miller: Yes, sir.

Instruction 11(d), Your Honor.

The Court: 11(d)?

Mr. Miller: Yes, sir, (d).

The problem here, it seems to me, is that the in-

struction implies that if plaintiff took into account the tax consideration——

The Court: 11(d)?

Mr. Miller: Yes, your Honor: It says: "That is to say, the jury may determine whether as the Government here contends, Earl Callan delayed deducting the loss in question to a year later than 1938 for reasons other than business care and prudence such as gaining a tax benefit which otherwise would have been useless to him, since a taxpayer is not allowed to pick and choose the year of loss for the sole purpose of gaining the most advantageous tax benefit."

We don't have any quarrel with the rule that the taxpayer may not pick and choose the year of loss. The problem is that the plaintiff could have properly, so we see it, delayed the deduction to a later year because he had a substantial right to recovery or because they appeared substantial by——

The Court: You confuse me. If you say, "I think this instruction should be amended to read as follows," then I will know what you are speaking about. But don't argue the reasons for it until we decide what change you wish made, Mr. Miller.

What objection do you have to it? This is 11(d), now.

Mr. Miller: Yes. If we put the word "only" after the word "1938," in quoting that last paragraph 11(d), it would more nearly express what I think.

The Court: I didn't understand that, now. Would you do that again?

Mr. Miller: If we said, "That is to say, the jury may determine whether, as the Government here

contends, that Earl Callan delayed deducting the loss in question to a year later than 1938 only for reasons other than business care and prudence, such as gaining the tax benefit, which otherwise would have been useless to him."

The Court: There might have been other reasons.

Mr. Miller: The point is, Your Honor, he may have had very good business reasons for feeling that he would recover and for not taking the loss, and yet he may also have considered the——

The Court: "Solely for reasons other than——"

Mr. Miller: That is right.

The Court: You don't want to say "only for reasons other than business care and prudence——"

"Such as for the sole purpose of gaining a tax benefit."

Mr. Miller: Yes.

The Court: Is that all right?

Mr. McHale: I think that too unduly restricts it, Your Honor, by putting the word "sole" in there.

The Court: Well, he might have a mixed purpose, might he not?

Mr. McHale: That is right there but I think the tax benefit is the major purpose. He may have other reasons.

Mr. Miller: If his other reasons were good reasons for delaying——

The Court: "Such as for the primary purpose."

Mr. Miller: Your Honor, I think if he had good, valid business reasons other than the tax reasons for believing that the loss should be delayed, it should——

The Court: That is true as an abstract proposition of law, but we are attempting to explain this to a jury.

"Such as for the primary purpose of gaining——" Wouldn't you say that would explain it? "Such as primarily for the purpose of gain——" That might read better, mightn't it?

Mr. Miller: Yes, sir.

The Court: If the jury thinks that he did this primarily for the purpose of gaining a tax benefit they aren't going to think that it was—they are certainly likely to think that it was for reasons other than business care and prudence.

Mr. Miller: That is correct.

The Court: In view of 11(d) may we not omit entirely the second paragraph of 11(b)?

Mr. Miller: I would say so, Your Honor.

The Court: Isn't it repetitious?

Mr. Miller: Yes, Your Honor, I suppose so. I would be agreeable to that, Your Honor.

There is one other instruction——

The Court: Just a moment. One thing at a time, gentlemen.

Mr. McHale: I think, Your Honor, that 11(b) expresses a little something in addition to 11(d). As Your Honor will remember, that, as originally drafted in my instruction, it was a tenuous claim for reimbursement, and I think that in the second paragraph in 11(b) there is the sense of the unreasonableness of pursuing the claim for that purpose. I grant that there is some duplication of purpose,

but I think that it might be a little clearer if both were in.

Mr. Miller: The point is, Your Honor, it seems to me, that there is a long and undue—I won't say undue, but perhaps unbalanced—dwelling upon the question of whether it was a tax reason——

The Court: I assume you gentlemen will argue the matter. Of course, there is a difference in the two points. The first is general, introducing the thought that the taxpayer may not unreasonably——

Mr. Miller: Well, I don't really care, Your Honor, about that. I would be agreeable to leaving it in or taking it out. The more important question to me is another instruction we requested that was omitted. I really don't care much about this aspect of the instruction.

The Court: I will combine the first two paragraphs of 11(b)—that is, the first two paragraphs of present 11(d).

Mr. Miller: Is that 11(d) you are combining.

The Court: And make them both into 11(b)—new 11(b).

Now, the last paragraph of old 11(b) will become new 11(d).

What was your other one now, Mr. Miller?

Mr. Miller: Your Honor, it is the instruction that plaintiff requested as A-5. It is taken from Your Honor's opinion.

The Court: There are a great many things in that opinion that can't help the jury, in my view. What is it about? A-5?

Mr. Miller: Yes, sir. "It is the policy of the law to claim deductions——"

The Court: No, no. I don't feel that should be given. When you tell them that they ought not to penalize the taxpayer, you are directing a verdict for the plaintiff, aren't you?

Mr. Miller: Well, Your Honor, we don't want any undue advantage.

The Court: I don't see how you can give that instruction without giving an undue advantage.

In these that the Court has proposed, do you have any further suggestions?

Mr. Miller: No, Your Honor, we do not.

The Court: In 12, as now written, I have at line 10, "Then the jury should find that the loss for income tax purposes was——" And then I inserted before "properly", or I intend to insert, "was not finally and entirely sustained, and so did not become properly deductible until the year of settlement—the year 1948."

I think it will tie it in better to tie this standard better with the first interrogatory, the language of the first interrogatory. And then again down at line —this will be rewritten and given to you—down at line 17, "Then the jury should find with respect to the Government's contention——"

By the way, is there any objection to using that form, "the Government's contention"?

Mr. McHale: No, Your Honor. I think it is proper here.

The Court: Very well. "Then the jury should find that the loss from income taxes was—" insert

"finally and entirely sustained and so was properly deductible in the year of physical destruction of the property—the year 1938 only."

Is there anything else in that group?

Mr. McHale: Your Honor, I think I made clear to Your Honor that I am going to make formal exceptions, although I realize Your Honor has set the law of the case, so I am not raising them.

The Court: I just meant—I have already indicated what I intend to give. I just want your suggestions as to whether I should.

Mr. McHale: There were a couple of instructions that I had suggested with respect to burden of proof.

The Court: Well, isn't that covered in the general —I didn't want to cover specially the burden of setting aside commissioner's findings. That would only confuse them, I think. The plaintiff here has the burden, clearly, by a preponderance, and, of course, you may argue that, that the plaintiff has that burden.

Mr. McHale: Very well.

The Court: Here's an instruction 13.

Mr. Clerk, will you hand a copy to counsel.

Mr. Miller: Your Honor, only one question.

The Court: You are referring to instruction 13?

Mr. Miller: Yes, Your Honor. At the end of the instruction, "If plaintiff Earl Callan regularly carried on at and prior to—" this says the loss—could we say "the flood in 1938"?—characterization of it as a loss in 1938 seems to me might be misconstrued, since the question is whether we have a deductible

loss in 1938 or 1948. And the word "flood" would say the same thing.

The Court: Yes. Any objection?

Mr. McHale: No objection to that, Your Honor. I was wondering about my proposed instructions with respect to that second issue.

The Court: It seems to me, Mr. McHale, that we don't have a question of abandonment. You can argue that question of abandonment if you want to. I don't see where there is any contention he changed the situation any time he was occupying that house.

Mr. McHale: I think the principle of income tax law in this country is, and always has been, that where a person resides is his residence and is not available for business purposes. I know the English law takes a different position.

The Court: There is nothing to prevent this man from moving into the place for the purpose of renting it and staying there while he is renting.

Mr. McHale: But while he is there I don't believe that it is available as business property.

The Court: I had the impression that the instructions that you request on this question of abandonment were correct, as a matter of law, but weren't applicable.

Now, if it is the rule in tax cases, as you contend, that no matter what the intent of the family is, if the head of the family says, "We will move in there just till we rent it and rent it as rapidly as we can and when we rent it we will more—" if it is your contention that the law immediately says that it is his residence the moment he moves in there and

spends the night, then it seems to me that the Court would have to direct a verdict.

Mr. McHale: I move for a directed verdict on that ground, Your Honor. And if you want me to brief it——

The Court: I had the impression it was a question of intent, that that man might move into a place for the purpose of occupying it the better to rent it.

In the early days of the automobile business, as I recall it, the dealer used to buy him a demonstrator and drive it around until he found a buyer and he would sell it. Then he would send for another one. And I suppose that plaintiff's contention is here, as I understand it, that he lived in these houses to demonstrate, to show them,——

Mr. Miller: That is correct.

The Court: ——the better to be on hand to show them.

Mr. McHale: I understand his contention very well.

The Court: Don't you think that instruction 13 as now written fairly states the respective contentions on that issue?

Mr. McHale: Yes. But what I wanted——

The Court: If you want to press that other point, I will be glad to look at any cases you bring in tomorrow morning. But unless they are binding precedent, I would not think that very good law.

Mr. McHale: I think the history of the income tax in this country is that the personal residence is just not available for business purposes, either for

losses, expenses,—whereas the English experience, their income tax law has been to the contrary.

Mr. Miller: Your Honor, I would like to interject at this point because we have briefed cases—we have set forth cases in our authorities which clearly set forth the negation of Mr. McHale's contention. I have been through this with Mr. McHale before, and the basis of his contention is that the—by occupying a residence, per se, regardless of any facts, it automatically becomes dedicated to personal use.

Now, we have submitted in support of our instructions a great number of cases where the plaintiff did occupy the property and it was held, nevertheless, that when he sold at a loss he was allowed to deduct the loss because it was a transaction for profit. Now, those decisions held that it was not a personal use, even though the party was in there. They had to so hold in order to find it was loss and a transaction entered into in profit. And everyone of Mr. McHale's cases that he mentioned as authorities for his requested instructions involving cases where it stated, as a fact, that the owner of the property moved into the property, lived there as his personal residence for a long period of years, and then he eventually made some effort to abandon it—which is not our case. And we don't make any claim of intention ever changing; just the same intention at all times.

The Court: I will be glad to see whatever you wish to submit on that, Mr. McHale.

Mr. McHale: Very well.

The Court: Here are copies of revised instruction 11(d) for each of you gentlemen.

Suppose you gentlemen go over these this evening and if you wish to take up any matter without the jury tomorrow morning, let the clerk know and we will convene without the jury and take up any matters you wish.

* * * * *

The Court: Now, will you gentlemen go over these again this evening, and if you see any further matters you wish to suggest, please do so. Let the clerk know and we will convene without the jury.

As I understand it, the form of special verdict is agreeable to both of you.

Mr. McHale: That is correct, Your Honor.

Mr. Miller: That is correct, Your Honor.

The Court: Very well.

Mr. Miller: Is there going to be a new 11(d), Your Honor?

The Court: A new 11(d)?

Mr. McHale: A new 11(d) is the last paragraph of old 11(b).

Mr. Miller: We have 11(b), the new 11(b), and take the old 11(b) and mark it 11(d) and mark——

The Court: No. There will be one brought out just shortly.

Mr. Miller: There is one more to come?

The Court: Yes, the old 11(d) should be destroyed. I haven't destroyed mine either, I find.

The old 11(d) should be removed. There will be a new 11(d). You have that in mind, don't you?

Mr. Miller: Yes, sir.

The Court: Would you see, Mr. Bailiff, before we adjourn, if my secretary has any others written?

Here is your instruction (d) gentlemen, 11(d).

Revised instruction 12 will be ready in a very few moments.

We will adjourn at this time, and if you want to wait a few moments, I will send the copies out.

The trial will be recessed until tomorrow morning at 9:30.

(Whereupon the trial was adjourned until 9:30 a.m., February 10, 1955.)

The Court: Are there ex parte matters?

The Clerk: No, Your Honor.

The Court: The case on trial, is it stipulated, gentlemen, the jury are absent?

Mr. McHale: So stipulated, Your Honor.

Mr. Miller: So stipulated, Your Honor.

The Court: Do you have some matters you wish to take up in the absence of the jury?

Mr. McHale: That is correct, Your Honor. I have done some further work on this second issue since last night. I have three proposed issues—the third one my secretary is bringing down—two of which I have handed the clerk and served copies on counsel.

I have cited there what I think is the leading case on the subject and the particular quotation which occurs again, the Circuit Court opinion with respect to appropriating to business use—and that is instruction No. 18——

The Court: Well, let's take up first—the plaintiff

has requested instruction D which involves the first issue, doesn't it?

Mr. Miller: Yes, it does, Your Honor; all my requested instructions.

The Court: I don't know what this requested instruction D means.

Mr. Miller: Sir, plaintiff's requested instruction D is requested in addition to the Court's proposed charge 11(d).

The Court: Let's take that up first.

Have you looked at them, Mr. McHale?

Mr. McHale: I just received them. Which one are we discussing?

Mr. Miller: Plaintiff's C, which is proposed as an addition to the Court's 11(d).

Now, Your Honor, let me make it plain, first, that in my opinion the last two paragraphs of 11(b) here, I think, should not be in the instructions because I think they are covered already by the part of 11(a) which tells the jury to consider whether plaintiff Earl Callan believes reasonably and in good faith he had a reasonable chance of recovery on his claim.

The Court: I don't understand what you are saying now.

Mr. Miller: Well, Your Honor, what I am saying——

The Court: You say that 11(b) as presently constituted—are you referring to that?

Mr. Miller: Yes, sir, that is correct.

The Court: ——that the last two paragraphs are repetitious? Is that what you are saying?

Mr. Miller: That is right. However, if Your Honor feels otherwise, then in order to make 11(b) a fair instruction——

The Court: Repetitious of what? Let's be specific about it.

Mr. Miller: Repetitious of whether plaintiff Earl Callan believed reasonably and in good faith that he had a reasonable chance of recovery on his claim against the Flood Control District, which is part of 11(a), subparagraph (4) at the end.

The Court: Well, I am inclined to agree with you; and all the more so since it will make the instruction more brief than otherwise. I am inclined to eliminate the last two paragraphs of present instruction 11(b).

Mr. McHale: Your Honor, I object to that; I don't think it is adequately covered elsewhere.

The Court: Of course, you could tell the jury all the myriad circumstances, but it seems to me this is a matter of argument.

Mr. Miller: In which case requested instruction C becomes superfluous, and we withdraw the request of that instruction.

The Court: That will be done. That is a matter you can argue, Mr. McHale. It seems to me that it is analogous in a negligence case to singling out some of the surrounding circumstances and to tell the jury they are to consider them. You can't mention all of them. We do mention some of the salient ones in 11(a).

Mr. McHale: But, Your Honor, there is no—I think that the——

The Court: The jury are told they are to consider all the surrounding circumstances, aren't they? Now, we can't manifestly detail all of them, can we?

Mr. McHale: You are detailing them in 11, and I think the last two paragraphs should be added to 11(a), the additional circumstances. If you are going to detail some of them, the others, favorable to the Government, shouldn't be left out.

The Court: Are the ones that are included favorable to the plaintiff?

Mr. McHale: I think there are some instructions, 2 and 3, that are favorable to the plaintiff—and 4. I mean, good faith. Your Honor knows our position with respect to this.

Mr. Miller: Your Honor, figure 1 is certainly not favorable. and the first——

The Court: 2 and 3 are favorable and 1 and 4 are not, are they?

Mr. McHale: I mean, if you are going to say just the belief of the plaintiff, the plaintiff can always believe in good faith. But I think the tax effect of this thing is also a factor that should be considered.

The Court: Mr. McHale, you are saying, in the portion in question, you are attacking the plaintiff's good faith, aren't you? Now, you may make any number of arguments attacking his good faith. And this is just pointing out one of them. It seems to me it is just another way of saying specifically that you may consider it as good faith or bad faith, and here are some things that might enable you to find that he acted in bad faith.

Mr. McHale: But I think the fact that the tax-

payer can't choose the year of loss is a matter that the jury should be instructed on. It is a matter that——

The Court: Well, that's left in instruction 11(b). the first two paragraphs of 11(b) remain.

Mr. McHale: But the last paragraph is, "The jury may determine whether, as the Government here contends, Earl Callan delayed deduction of the loss in question to a year later than 1938 for reasons other than business care and prudence, such as primarily for the purpose of gaining a tax benefit which otherwise would have been useless to him since a taxpayer is not allowed to pick and choose the year of loss."

The Court: But subparagraph 2, the second subparagraph of 11(b) remains. It reads, "A taxpayer may not reasonably defer—" if we say "postpone", I think the jury will know more what *the* means.

"——postpone the deduction for a loss until some more tax-advantageous year—" "—until some later and possibly more tax-advantageous year, by pursuing unreasonably a claim for possible reimbursement for a loss."

Mr. McHale: Can we add there, since a taxpayer is not allowed to pick and choose the year of his loss for the sole purpose of gaining the most advantageous benefit?

The Court: Yes, that may be done.

That will be done. Of course, as I understand it, in the best of faith the taxpayer may not unreasonably pursue a claim for possible reimbursement and

postpone his deduction until some later year, even though the later year is a less tax-advantageous year. Is that not so?

Mr. Miller: That is correct, Your Honor.

Mr. McHale: That is right. I mean, can't do it for tax damages.

The Court: Can't do it either aimlessly or for that purpose, can he?

Mr. McHale: I think it should be highlighted here that this the fact, because I think the "best of faith" is not going to be too clear to the jury.

The Court: Well now, instruction 11(b) will be rewritten to read as follows: "The mere existence of a claim or suit for recovery against the Los Angeles Flood Control District is not enough in and of itself to prevent the loss from being deductible in 1938. A taxpayer may not reasonably postpone the deduction for loss until some later and possibly more tax-advantageous year by pursuing unreasonably a claim for possible reimbursement for his loss, since a taxpayer is not allowed to pick and choose the year of loss for the sole purpose of gaining the most advantageous tax benefit."

Does that cover it, gentlemen?

Mr. Miller: Yes, Your Honor.

Mr. McHale: Yes, Your Honor.

The Court: Very well. That will be revised instruction 11(b).

Then the plaintiff withdraws requested instruction C?

Mr. Miller: That is correct, Your Honor.

* * * * *

Anything further, gentlemen?

Mr. Miller: Not from the plaintiff, Your Honor.

Mr. McHale: That is all, Your Honor.

The Court: Is it stipulated, gentlemen, that the jury are present?

Mr. Miller: So stipulated, your Honor.

Mr. McHale: So stipulated.

The Court: Members of the jury, you have heard the evidence and the argument. Now it is the duty of the court to instruct you as to the law governing the case. It is your duty, as jurors, to follow the law as stated in the instructions of the court and to apply the law so given to the facts as you find them from the evidence before you. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the court.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the complaint of the plaintiffs Earl Callan and Helen W. Callan and the answer of the defendant. You are to perform this duty without bias or prejudice as to any party. The law does not permit jurors to be governed by sympathy, prejudice, or public opinion. The parties and the public expect that you will carefully and impartially consider all the evidence, follow the law as stated by

the court, and reach a just verdict, regardless of the consequences.

As you have heard counsel for the defendant say, though this in name is a suit against the Collector of Internal Revenue it, in substance, is a suit against the Government.

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. The Government is entitled to the same fair trial at your hands as a private individual. The law is no respector of persons; all persons, including the Government, stand equal before the law, and are to be dealt with as equals in a court of justice.

The burden is on the plaintiff in a civil action, such as this, to prove every essential element of plaintiffs' case by a preponderance of the evidence. If the proof fails to establish any essential element of plaintiffs' case by a preponderance of the evidence, then you must find for the defendant.

The term "preponderance of the evidence" means the greater weight of the evidence. In other words, such evidence as, when weighed with that opposed to it, has more convincing force and produces in your minds conviction of the greater probability of truth, after you have considered all the evidence in the case.

Evidence may be either direct or indirect. Direct evidence is that which in itself, if true, conclusively establishes a fact. Indirect evidence is that which tends to establish a fact in dispute by proving

another fact. Indirect evidence is of two kinds, namely, presumptions and inferences.

An inference is a deduction or conclusion which reason and common sense lead the jury to draw from facts which have been proved.

A presumption is an inference which the law requires the jury to make from particular facts. Unless declared by law to be conclusive, a presumption may be overcome or outweighed by direct or indirect evidence to the contrary of the fact presumed; but unless so outweighed, the jury are bound to find in accordance with the presumption.

Unless and until outweighed by evidence to the contrary, the law presumes that private transactions have been fair and regular; that the ordinary course of business has been followed; and that the law has been obeyed.

Statements and arguments of counsel are not evidence in the case, unless made as an admission or stipulation of fact. When the attorneys on both sides stipulate or agree as to the existence of a fact, the jury must accept the stipulation as evidence and regard that fact as conclusively proved.

The evidence in the case consists of the sworn testimony of the witnesses, all exhibits which have been received in evidence, all facts which have been admitted or stipulated, and all applicable presumptions stated in these instructions. Any evidence as to which an objection was sustained by the court, and any evidence ordered stricken by the court, must be entirely disregarded.

You are to consider only the evidence in the case.

But in your consideration of the evidence you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw, from facts which you find have been proved, such reasonable inferences as seem justified in the light of your experience.

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. A witness is presumed to speak the truth. But this presumption may be outweighed by the manner in which the witness testifies, by the character of the testimony given, or by contradictory evidence. You should carefully scrutinize the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness's intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, consider

whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or willful falsehood. If you find the presumption of truthfulness to be outweighed as to any witness, you will give the testimony of that witness such credibility, if any, as you may think it deserves.

A witness may be discredited or impeached by contradictory evidence; or by evidence that at other times the witness has made statements which are inconsistent with the witness's present testimony.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness's testimony in other particulars; and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

While the burden rests upon the party who asserts the affirmative of an issue to prove his allegation by a preponderance of the evidence, this rule does not require demonstration, or such degree of proof as produces absolute certainty; because such proof is rarely possible.

In a civil action such as this, it is proper to find that a party has succeeded in carrying the burden of proof on an issue of fact if, after considering all the evidence in the case, the evidence favoring such party's side of the question is more convincing than

that tending to support the contrary side, and if it causes the jurors to believe that the probability of truth on such issue favors that party.

You are not bound to decide any issue of fact in accordance with the testimony of any number of witnesses which does not produce conviction in your minds, as against the testimony of a lesser number of witnesses or other evidence which does produce conviction in your minds.

The test is not which side brings the greater number of witnesses, or presents the greater quantity of evidence, but which witness and which evidence appeals to your minds as being most accurate and otherwise trustworthy.

The testimony of a single witness, which produces conviction in your minds, is sufficient for the proof of any fact, and would justify a verdict in accordance with such testimony even though a number of witnesses may have testified to the contrary if, after weighing all the evidence in the case, you believe that the balance of probability points to the accuracy and honesty of the one witness.

The parties agree that the actual physical loss occurred in March of 1938. It is also agreed that plaintiff Earl Callan's claim for reimbursement against the Los Angeles County Flood Control District for damages due to claimed negligence by the District had been denied by the Flood Control District at the close of 1938. The law permitted plaintiff Earl Callan nonetheless to delay claiming a tax deduction for the loss while pursuing his claim against the Flood Control District, if to do so would

be the exercise of ordinary business care and prudence under all the surrounding circumstances.

The Government contends that the loss should have been deducted in the year 1938 and that the postponement of the claimed deduction until the claim against the Flood Control District was finally settled was not an act done in the exercise of ordinary business care and prudence under all the surrounding circumstances, because, the Government argues, the possibility of recovery on the claim against the Flood Control District was too contingent and uncertain.

Plaintiffs contend that in the light of all the surrounding circumstances plaintiff Earl Callan exercised ordinary business care and prudence in delaying deduction of the loss until 1948.

This is the first issue the jury are called upon to determine.

In determining whether plaintiff Earl Callan exercised ordinary business care and prudence in delaying deduction of the loss for income tax purposes until his claim against the Los Angeles County Flood Control District was finally settled in 1948, the jury should consider all the surrounding circumstances as shown by the evidence.

In this connection the jury should consider, along with other surrounding circumstances shown by the evidence: (1) the date of the physical loss; (2) whether plaintiff Earl Callan made a full and fair disclosure of the facts to an attorney and thereafter reasonably and in good faith followed and relied upon the advice of his counsel; the jury may also

consider the success or lack of success of plaintiff Earl Callan in the prosecution of his claim against the Flood Control District; (3) whether plaintiff Earl Callan prosecuted his claim against the Flood Control District in good faith that he had a reasonable chance of recovering on his claim against the Flood Control District.

The mere existence of a claim or suit for recovery against the Los Angeles County Flood Control District is not enough in and of itself to prevent the loss from being deductible in 1938.

A taxpayer may not reasonably postpone the deduction for loss until some later and possibly more tax advantageous year by pursuing unreasonably a claim for possible reimbursement for his loss, since a taxpayer is not allowed to pick and choose the year of loss for the sole purpose of gaining the most advantageous tax benefit.

If you find that plaintiff Earl Callan claimed on his 1938 income tax return any loss arising from damage to any part of his property by reason of the 1938 flood, that fact, even though no claim as to that deduction is involved in this case, may be considered in determining plaintiff Earl Callan's good faith in postponing any deduction for the loss arising from flood damage to the properties involved in this case, until after his claim against the Flood Control District had been settled, in 1948.

The stipulated or agreed fact that no deduction was claimed for the loss here in question on plaintiff Earl Callan's 1938 tax return may be considered in determining the issue as to whether or not he in

good faith postponed claiming a tax deduction for the loss.

If the jury should find from the evidence, as plaintiffs contend, that plaintiff Earl Callan did exercise ordinary business care and prudence in delaying deduction of the loss in question for income tax purposes until his claim against the Los Angeles County Flood Control District was finally settled in 1948, then the jury should find that the loss for income tax purposes was not finally and entirely sustained, and so did not become properly deductible, until the year of settlement—the year 1948.

If on the other hand the jury should find from the evidence, as the Government contends, that plaintiff Earl Callan's postponement of deduction for the loss was not an act done in the exercise of ordinary business care and prudence, then the jury should find that the loss for income tax purposes was finally and entirely sustained, and so was properly deductible, in the year of physical destruction of the property—the year 1938, only.

Turning now to the second issue in the case, it is the contention of plaintiffs in this action that plaintiff Earl Callan originally acquired the real estate, constructed the improvements thereon, and acquired the furniture and furnishings, for the purpose of making a profit in the course of plaintiff Earl Callan's business of constructing, furnishing, owning, operating and renting residential real estate, and that all said property was held by plaintiff Earl Callan at all times to and including the time of the flood in 1938 in the course of that business.

It is plaintiffs' contention that the reason, purpose and character of plaintiff Earl Callan's occupancy of the premises at 1740 Riverside Drive, including the use of the improvements, furniture and furnishings was at all times during such occupancy and use, to complete the proper furnishing thereof and more advantageously to display such property to prospective tenants or purchasers in the course of such business and that, because such real estate, improvements, furniture and furnishings were business property of plaintiff Earl Callan, plaintiffs' loss, resulting from the damage and destruction of such property, is attributable to the operation of a business which plaintiff Earl Callan regularly carried on—namely, the business of constructing, furnishing, owning, operating and renting residential real estate.

It is the contention of the Government, as defendant in this action, that a major reason, purpose and character of plaintiff Earl Callan's occupancy of the premises at 1740 Riverside Drive, including the use of the improvements, furniture and furnishings, was not business but that of a personal residence for plaintiff Earl Callan, and that because such real estate, improvements, furniture and furnishings were not business property, plaintiffs' loss resulting from the damage and destruction of such property is not attributable to the operation of a business regularly carried on by plaintiff Earl Callan.

So the second issue for the jury to decide is whether or not plaintiffs' loss, resulting from the dam-

age and destruction of the property at 1740 Riverside Drive, including the real estate, improvements, furniture and furnishings, is attributable to the operation of a business which plaintiff Earl Callan regularly carried on at and prior to the flood in 1938.

If you find from the evidence that plaintiffs occupied the property for any other reason than that of furthering the interests of plaintiff Earl Callan's business, then you should find that the occupancy was not for business purposes, and that the loss was not attributable to the operation of a business.

In order that you might better understand this issue, or the purpose of it, perhaps I should add, as I understand it, you see, you have two years here, 1938 and 1948, and if you find that the plaintiff exercised reasonable care, business care and prudence in postponing the loss until 1948, he is entitled to deduct it whether this is a residential property or a business property. As I understand it, the issue as to whether or not it is a residence or business arises because of the plaintiffs' desire to carry back the deduction from 1948 to 1946, and that can be done only if it is a business loss, as I understand it.

Is that correct?

Mr. McHale: That is correct, your Honor.

Mr. Miller: Yes, your Honor.

The Court: You agree on that, Mr. Miller?

Mr. Miller: Yes, sir, that is correct.

The Court: So that is the way that second issue arises in the case.

A business is that which occupies the time, atten-

tion and labor of men for the purpose of a livelihood or profit.

A person can be engaged in more than one trade or business.

The renting of real property is a business, and rental properties are considered as used in that business.

If property is purchased with the intention of improving it and operating it in the purchaser's business, such property is not deprived of its character as used in the trade or business by the occurrence of unexpected events which prevent actual operation of such property in such business.

If the property is owned by a taxpayer as business property, a loss resulting as a consequence of destruction or damage or such business property by a flood is a loss attributable to the operation of the business.

The law of the United States permits the judge to comment to the jury on the evidence in the case. Such comments are only expressions of the judge's opinion as to the facts; and the jury may disregard them entirely, since the jurors are the sole judges of the facts.

During the course of a trial, I occasionally ask questions of a witness, in order to bring out facts not then fully covered in the testimony. Do not assume that I hold any opinion on the matters to which my questions related. Remember at all times that you, as jurors, are a liberty to disregard all comments of the court in arriving at your own findings as to the facts.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors.

In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are judges—judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

Before giving you the final instruction and explaining to you the form of verdict, we will take a brief recess of three minutes. You will be excused with the usual admonition because the case has not yet been submitted to you for your verdict.

You will now be excused for a three-minute recess.

(Whereupon the jury retired from the courtroom.)

The Court: Very well, gentlemen. Are you ready to have the jury summoned? If there are any further objections before the jury finally retires, if

either counsel think of anything further they wish to make a record of, if you will just indicate that you wish to take up some matter before the jury retires, the jury will be again excused.

Mr. Miller: Thank you, your Honor.

Mr. McHale: Thank you, your Honor.

The Court: Please summon the jury.

(Whereupon the jury returned to the courtroom.)

The Court: Is it stipulated, gentlemen, the jury are present?

Mr. McHale: So stipulated, your Honor.

Mr. Miller: So stipulated, your Honor.

The Court: Upon retiring to the jury room, you will select one of your number to act a foreman. The foreman will preside over your deliberations and will be your spokesman in court. A form of special verdict has been prepared for your convenience, and attorneys on both sides have agreed that it is in proper form to submit, and I exhibit it to you now. It is a two-page document, rather formidable looking, but it isn't as bad as it looks. It is entitled in the court and cause and sets forth some questions.

It reads: "Special Verdict.

"We, the jury in the above-entitled cause, unanimously find the answer to Question No. 1, to wit:

Question 1: 'Was plaintiff Earl Callan's loss from the March 2, 1938 flood finally and entirely sustained and deductible by him in 1938 or 1948?'

Answers: (1938).... (1948)....."

So, you are called upon to find, under the instructions, whether plaintiff Earl Callan acted with rea-

sonable business care and prudence in postponing claiming the deduction from 1938 when the physical loss occurred until 1948 until after he settled his claim finally with the Flood Control District. So you are called upon to answer that question; either 1938, and the foreman will write in the blank the appropriate date, either in 1938 or 1948.

Now, if your answer to that question is "1938," then Question 2 doesn't arise, whether or not it is business property or residence property doesn't arise. The directions are right here on the face of the special verdict. It says in parentheses, "(If the first question is answered '1938' Question No. 2 need not be answered.)"

Now, Question No. 2:

"We, the jury in the above-entitled cause, unanimously find the answer to Question No. 2, to wit:

Question 2: 'Was any portion of Earl Callan's loss attributable to the operation of a business regularly carried on by him on March 2, 1938, at 1740 Riverside Drive with respect to the following property there located:

(a) 'To the Land?'

Answers: (No).... (Yes)....

(b) 'To the buildings and improvements?'

Answers: (No).... (Yes)....

(c) 'To the furniture and furnishings?'

Answers: (No).... (Yes)....."

As you will notice, that property has been broken down and instead of being treated as one piece of property at 1740 Riverside Drive it has been broken down really into three pieces of property; namely,

the land and building and improvements, and the furniture and furnishings. So it is the same question that is asked you as to all three of those items. Those three questions (a), (b) and (c) comprise No. 2.

And then, "Dated: This....day of February, 1955.

.....

Foreman of the Jury"

You will take this form of special verdict with you to the jury room and after you have reached your unanimous answer, as required by the instructions, the foreman will fill in the necessary blanks and date and sign the special verdict and return with it to the courtroom.

Mr. Clerk, will you swear the bailiffs.

(Whereupon, the bailiffs were sworn by the clerk.)

The Court: Now, ladies and gentlemen of the jury, you will be in the custody of the bailiffs who have just been sworn. All of the exhibits which have been received in evidence in the case will be sent to the jury room.

Do you have all the exhibits ready, Mr. Clerk?

The Clerk: I do, your Honor.

The Court: Have counsel checked them? Are you satisfied, gentlemen? First, are there any exhibits that were marked for identification only and not offered?

The Clerk: There was one exhibit, your Honor.

The Court: That was Exhibit 16.

The Clerk: Exhibit 16.

The Court: Are you agreed on that?

Mr. McHale: Yes, that is not to go in.

Mr. Miller: That is correct.

The Court: May it be stipulated that the clerk has handed to the bailiff all the exhibits which were received in evidence in the case, and such exhibits may be taken to the jury room?

Mr. Miller: The stipulation of facts, is that included?

The Clerk: That is included.

The Court: That is Exhibit 33.

The stipulation of facts, ladies and gentlemen, which is the agreement the parties made as to the facts and which the Government says was substituted for any evidence the Government wishes to offer on defense is Exhibit 33. It is a written document that looks something like the special verdict, only it contains a great many more pages.

And the instructions of the court will be sent to the jury room.

I suppose, this being 12:00 o'clock, the first order of business will be for you to go to lunch. So the clerk will be instructed to enter an order at this time directing the bailiff to take you to lunch, whenever you are ready to go, at the expense of the parties.

You may now retire to the jury room to deliberate upon your verdict.

Mr. McHale: Your Honor,——

The Court: Just a moment, please.

Mr. McHale, do you wish something before the jury retires?

Mr. McHale: Yes, your Honor.

The Court: The jury will resume its place in the

box. I wish you would have been quicker about that, Mr. McHale.

Mr. McHale: I am sorry, your Honor.

The Court: Is it stipulated the jury are all present?

Mr. McHale: So stipulated, your Honor.

Mr. Miller: So stipulated, your Honor.

Mr. McHale: Before the jury retires, I would like to address a remark to the court, in the absence of the jury.

The Court: Is it essential, Mr. McHale?

Mr. McHale: Could I approach the bench?

The Court: Yes, you may.

(Whereupon the following proceedings were had outside the hearing of the jury.)

The Court: Is it stipulated, gentlemen, these proceedings are being taken at the bench outside the hearing of the jury?

Mr. McHale: So stipulated, your Honor.

Mr. Miller: So stipulated, your Honor.

Mr. McHale: With respect to the instructions to the jury, your Honor's informal remarks, I wish the standard to apply; I wish my exception to run——

The Court: They will apply. I think your position is perfectly clear.

(Whereupon the following proceedings were had in the presence and hearing of the jury.)

The Court: Very well, ladies and gentlemen of the jury, you may retire to the jury room to deliberate upon your verdict.

[Endorsed]: Filed July 1, 1955.

Wednesday, February 9, 1955; 2:45 p.m.

The Court: Is it stipulated, gentlemen, the jury have left the courtroom?

Mr. McHale: So stipulated, your Honor.

Mr. Miller: So stipulated, your Honor.

The Court: You may make your motion, I take it, for judgment of dismissal under the rule.

Mr. McHale: Yes, your Honor; motion for directed verdict.

The Court: Motion for judgment of dismissal.

Mr. McHale: Motion for judgment of dismissal. First of all I would like to——

The Court: I take it it is made on the ground that upon the facts and the law the plaintiffs have shown no right to relief.

Mr. McHale: That is right, your Honor. And the first ground would be that made in our previous motions to dismiss, which has been thoroughly briefed and your Honor has ruled.

Secondly, I believe that under the facts as adduced today and yesterday in the trial of this case that the loss is final and complete. And the facts further show that the plaintiff himself regarded it as such in that with respect to 1705 and 1717 Rancho he deducted that loss on his 1938 income tax return by taking as an expense item the cost of repairs to those two houses, which in effect was taking a loss. And the income tax law is that you can't take a loss twice. You can either take it as a loss or you can deduct it. But what he did here was in 1938 he took the cost of repairs which in effect was taking the loss

in 1938 as to two of the four parcels of real estate.

The Court: He took that as an expense.

Mr. McHale: He took it as an expense, but——

The Court: It wouldn't be a capital loss, would it?

Mr. McHale: Nevertheless, your Honor, that flowed from the flood damage in 1938.

The Court: Yes. Is there anything inconsistent in taking that deduction and not claiming the other as a closed transaction?

Mr. McHale: I think so. He had the same claim for reimbursement for those repairs to those two houses against the Los Angeles Flood Control District as he did to 1740 Riverside Drive and 1723 Rancho; and by deducting that from his income rentals in 1938 he in effect took that loss in 1938. And that's the second ground of the Government's motion.

The third ground is with respect to the proposed second issue in this case, the special verdict. And that is this: That plaintiff lived in the 1740 Riverside Drive property up to the time of the flood; had not rented or leased it to anyone else; had not acquired other quarters or had done nothing to show an intention to acquire other quarters. Therefore, one, he had no intention to abandon it as a residence, because it was his residence. And secondly, he had not in fact abandoned it. Both factors are necessary under the Internal Revenue laws before the loss of that residence can arise from the operation of a business. And for that reason we request a directed verdict on issue No. 2.

As a third ground, and that is as to the second ground of the special verdict, that in effect in asking

for a net operating loss carry-back from 1944 to 1946, the plaintiff is asking for provisions that were in the Internal Revenue law in 1948; carry-back net operating loss. However, the basic factual situation, from which this arose and which was postponed because of the chance of reimbursement, arose in 1938. At that time the provisions for net operating losses were not in the Internal Revenue laws, were not enacted until later; and when they were enacted were made specifically inapplicable to a period prior to January 1939. And for that second reason with respect to the special verdict we move for a judgment on the second issue.

The Court: You mean inapplicable to any transactions occurring prior to 1939?

Mr. McHale: Well, yes, it was, your Honor. In other words, when they enacted the law it was for periods after 1939. Now, this arises out of a transaction of 1938, so I say it was the spirit of the law that this should not apply to a transaction arising in 1938.

The Court: Well, isn't our problem here on the second issue whether or not the jury might reasonably find from the evidence that the plaintiff, Earl Callan, occupied the property primarily for the purpose of renting or selling it rather than primarily as a residence?

Mr. McHale: That is right, that he occupied it. And it follows from that, under the provisions of the law, that it was an operating expense rather than a personal expense or personal casualty loss; that it would go as an operating loss. It would be carried

back to the 1948 law. And I want to point out to the court that under the laws existing in 1938, when the flood occurred, this could not be done. And when the net operating provisions of law were enacted they were made inapplicable to the period before that.

The Court: But if this loss is a business loss and is properly deductible in 1948, then it would properly be carried back to 1946.

Mr. McHale: The point I am making is, not if it relates to 1938.

The Court: You say the spirit of the law——

Mr. McHale: Yes. As I understand your Honor's decision, the loss actually occurs in 1938 but it is postponed because of the chance of reimbursement; and the spirit of the law was not to allow the net operating loss provisions prior to 1939.

The Court: No. The loss, I suppose philosophically, doesn't occur in 1938; it does physically but not for tax purposes if the deduction is postponed, because by definition the loss must be deducted in the year in which it occurs, does it not?

Mr. McHale: That's right your Honor.

The Court: So by definition in order to be deductible in 1948 it must be, in law, held to occur in 1948.

Mr. McHale: I raise that question for your Honor there.

The Court: As I understood this case when I had it on the motion to dismiss, it was that the plaintiff Earl Callan had elected to treat about half of this

loss as a loss in 1946 when he declined to contest the reduction in the verdict, wasn't it?

Mr. McHale: Yes, your Honor.

The Court: Well, that doesn't seem to be here now. You gentlemen have eliminated that by stipulation.

Mr. McHale: Yes, we have eliminated that by stipulation, your Honor. We have agreed to values. We have in effect agreed to drop that case. And that is why I made the motion to dismiss that case, and the other causes of action in this case——

The Court: Now, we have the situation of whether the loss was completed at a closed transaction was to be deductible in 1938, or whether the ordinary business care and prudence permitted the plaintiff Earl Callan to defer the deduction until after he had settled with the Flood Control District in 1948. Is that the situation?

Mr. McHale: Yes, your Honor.

The Court: Well, aren't those both jury questions now?

Mr. McHale: Well, I am moving that enough facts have been adduced to take it away from the jury, your Honor.

The Court: I will deny the motion; that is, the motion for a judgment of acquittal pursuant to Rule 41(b) made upon the close of the plaintiff's case; and the motion as renewed and made upon the close of all the evidence; having in mind that the defendant offers some evidence through the stipulation, as to the facts.

Now, gentlemen, I am not as far along on these

instructions as I expected to be by this time. My secretary is typing some of them.

Mr. McHale: Your Honor, I was wondering about—you said Rule 41. I also meant Rule 50. Am I correct? I want to be sure that I state all my proper grounds here.

The Court: Oh, yes. Well, your motion for directed verdict at the close of all the evidence. Your motion—I am sorry—is a proper motion either under 41(b) or for directed verdict under Rule 50, either upon the close of the opponent's evidence or upon the close of all the evidence.

So it will be deemed that you made both motions under both rules, and they are both denied. The motions will be deemed made upon the grounds stated, and denied.

Thursday, February 10, 1955; 11:40 a.m.

The Court: Is it stipulated, gentlemen, the jury have left the courtroom?

Mr. McHale: So stipulated, your Honor.

Mr. Miller: So stipulated.

The Court: Now, I have excused the jury pursuant to Rule 51 for the purpose of permitting either side to record their objections to the instructions given, or their exception to the refusal to give requested instructions.

The rule provides, as you know, that no party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects, and the grounds of his objections. Of course that, as I say, applies not only

to the instructions given, but to any refusal or failure to instruct.

Are there any exceptions or objections which the plaintiff wishes to take as to the instructions given, including Instruction 18, gentlemen, which I have not yet given as a formality.

Mr. Miller: No objection by the plaintiff, your Honor.

The Court: The defendant?

Mr. McHale: Yes, your Honor. With respect to the instructions, as I previously pointed out, the Government has consistently taken the position that the test is not as that set out by the court in the instructions. And this has been previously argued and briefed and decided by the court on a motion to dismiss.

The Government relies upon the case of the Highway Trailer case. I don't have the citation before me, but it is cited in your Honor's opinion, 116 Fed. Sup.

In that connection, I object——

The Court: Has the defendant requested instructions embodying the rule of the Highway Trailer case?

Mr. McHale: I believe so, your Honor.

The Court: Will you give us the citation for the record? I have it here if you don't have it.

Mr. McHale: I believe I have it here, your Honor. That's Commissioner vs. Highway Trailer Company, 72 Fed. 2d, 913.

The Court: That's a decision of what circuit?

Mr. McHale: Seventh Circuit, 1934; certiorari denied 293 U. S. 626.

The Court: The opinion on the motion to dismiss which you referred to, this court's opinion, is reported in 116 Fed. Sup. at 191.

Mr. McHale: Yes, your Honor. And the Commissioner vs. John Thatcher and Son, 76 Fed. 2d 900; which were embodied in some of the requested instructions which were not given, I believe.

And so with respect to the instructions that are given——

The Court: Does the defendant object to the failure and refusal of the court to give any of the requested instructions of the defendant which were omitted?

Mr. McHale: You want first the omitted instructions?

The Court: Yes.

Mr. McHale: Yes.

The Court: You might just specify them by number. I am familiar with your arguments on the matter. You will not need to repeat them. They will be deemed repeated, all the arguments you made on the motion to dismiss and heretofore during the trial of the case.

Mr. McHale: And also United States Treasury regulations 111, Section 2923.

The Court: You will not need to specify the grounds of your objections for failure of the court to charge on your theory of the proper standard to be applied here. But I think you might well specify the numbers of the instructions that the court re-

fused to give, the number of your requested instruction.

Mr. McHale: As to that issue, I think, your Honor, instructions 4 and 5.

The Court: That is, as to the Highway Trailer Company problem.

Mr. McHale: Yes, your Honor.

With respect to the second issue, the abandonment and use of the property as a residence, I request the court for the cases cited in the instructions prepared, that the court should give instructions 12, 13, 14, 15, 17, 18, 19 and 20.

The Court: I thought that 13A might meet your objection there. But you reserve your objection as to all of those, as to the failure of the court to give all of those instructions.

Mr. McHale: Yes, sir.

The Court: Now, does that complete your objections as to failure and refusal?

Mr. McHale: Yes, your Honor, as to failure and refusal.

The Court: Now, as to the instructions thus far given, do you have any objections?

Mr. McHale: Yes. Now, with respect to the instructions given, your Honor, the principal issue of that raised by the Highway Trailer case, to which I referred, I think is embodied in instruction 11, the sentence commencing line 8, that sentence, "The law permitted plaintiff Earl Callan nonetheless to delay claiming a tax deduction for the loss or pursuing his claim against the Flood Control District if to do so would be the exercise of ordinary business care and

prudence under all the surrounding circumstances."

The Court: You assign that as error?

Mr. McHale: Yes, sir, we do.

The Court: Because it is inconsistent with the rule of the Highway Trailer case?

Mr. McHale: Yes, your Honor.

The Court: Any others?

Mr. McHale: Yes, 11(A), your Honor; the first paragraph, and sub-parts 2, 3 and 4; on the same ground.

The Court: Very well. Any others?

Mr. McHale: And on the same ground, the first paragraph of instruction 12.

The Court: Very well. Any others?

Mr. McHale: Instruction 14, Your Honor; the fourth paragraph. This is on the abandonment issue, now. I believe that this is immaterial and irrelevant on the subject.

The Court: The third paragraph?

Mr. McHale: No, your Honor. It is the fourth paragraph, commencing line 13.

The Court: Of instruction 13?

Mr. McHale: 14, your Honor. I am sorry.

The Court: Yes. You made that suggestion earlier.

Mr. McHale: I made the same objection previously.

The Court: Yes. I have your point on that. Any others?

Mr. McHale: I object to the form of 13 in that I suggest instead Government's 12. I believe it is 12.

The Court: Very well.

Mr. McHale: That concludes it, your Honor.
The Court: That is all?
Mr. McHale: That is all, your Honor.
[Endorsed]: Filed July 1, 1955.

[Title of District Court and Causes 13357-13922.]

Thursday, February 10, 1955; 10:00 a.m.

The Court: You may open the argument, Mr. Miller, on behalf of the plaintiff.

Mr. Miller: Thank you, your Honor.

Well, now, ladies and gentlemen of the jury, we are going to try to make this brief, again, for you. I can't see your faces very clearly because I am a little nearsighted, so if I don't seem to be looking you squarely in the eye please understand.

We want to thank you for listening so attentively to our testimony in evidence. You have been a very attentive jury. We asked for a trial by jury in this case because we think that truth, common sense and simple justice support our case. All we ask of you is that you give your verdict on the basis of the facts as you saw them in the light of the evidence. We have tried to present this evidence as honestly and as straight forwardly as we could so that you could form your own unbiased opinion and independent judgment of the merits of our case, and we hope that you will feel as we do, that the evidence calls for a verdict in our favor. We want to ask you to please bear in mind that Mr. Callan didn't take anything away from the Government. He just wants to re-

cover back the money that he paid under protest which he feels was improperly assessed against him.

You have observed our witnesses, Mr. Callan, Mr. Vargo, Mr. Wright and Mr. Lee. You have heard them testify, and I think you will agree that they are truthful and honorable men and their testimony was worthy of belief. Their testimony wasn't always exact as to some of the details and dates, but I think you know from your own experience that you wouldn't expect them to recall minute details.

Now, basically, the fact is here that Mr. Callan sustained grievous damage when a flood occurred in 1938. He didn't cause the flood. It wasn't his fault that the flood occurred. And the only issue that is incurred here is whether he is entitled to deduct a loss arising out of that damage, to deduct that loss in the year when they finally determined there was actually a loss and what that loss amounted to. Basically, the issue here, as we see it, is whether under the facts and circumstances as they were known and could have been known with reasonable diligence to Mr. Callan in 1938 is did Mr. Callan in good faith reasonably believe that he had at least a reasonable chance of recovery on his damage against the Flood Control District and therefore acted with ordinary business care and prudence in concluding that his damage in the flood of 1938 did not then represent a closed and completed loss, because he might have felt that he probably would get his reimbursement for those damages in his action.

Now, let's look at what happened. You saw the pictures of the property before the flood and you

saw the pictures taken during the flood. You saw the river washing away those houses. And you saw how the properties were washed away in a matter of hours, and despite the testimony in the case that there were supposed to be flood protection works to prevent this very thing from happening.

You heard how Mr. Callan came home one evening on March 2, 1938 and found that properties on which he personally worked for years, properties of great value, had simply been washed away. I think you will agree that he suffered then and there a grievous injury through no fault of his own, an injury which the Flood Control Works were supposed to prevent.

Now, you heard the testimony of how Mr. Callan promptly consulted eminent and reputable attorneys, and people in the vicinity whose property was damaged also consulted attorneys. They did likewise. They hired reputable and competent engineers and paid them to make a study and prepare an engineering report to determine whether the Flood Control District was negligent in permitting the catastrophe to occur. You saw the documents in this courtroom. You heard Mr. Callan testify that he didn't hire his regular attorney, Mr. Harry McClean, to handle this case but instead he hired the firm of Hill, Morgan and Bledsoe, including Mr. Morgan and Judge McCarthy, because they were top rate specialists in this type of case. You heard the testimony that all these attorneys, including Mr. Henry Lee, who was the attorney for the house people and who acted in the same case in the joint

action, that all these attorneys did a great deal of work in the case, and how they conferred many times with the engineers and how Mr. Callan conferred many times, not only with the attorneys, but also with the engineers; and how at all times during the year 1938 the flood case attorneys had the firm conviction that they would recover on their suit; and the engineers verbally stated—and in their report stated both to Mr. Callan and to his attorneys—that the Flood Control District was negligent and the damage to Mr. Callan's property was caused by that negligence.

These attorneys and these engineers had nothing to do with Mr. Callan's taxes. They were doing a lot of work in this case. They were busy attorneys. And you know that attorneys don't have anything to sell except their time and ability. They couldn't get paid for all their time and work in the case unless they collected. They didn't have to take the case. You saw the letter which showed they did take the case and on what basis they took the case. And I am sure you will agree that they wouldn't have taken the case if in their own self interest, their independent judgment, looking at it from their own viewpoint, they had not believed that they were going to recover in the action.

Now, all these attorneys, Mr. Lee, Mr. Morgan, Mr. Hill, and Judge McCarthy told Mr. Callan that he would recover; and the engineers, Mr. Reagan and Mr. Bell told Mr. Callan he would recover. Now, if you were in Mr. Callan's position and you consulted experts on the subject and those experts had

nothing to gain by being wrong, wouldn't you have believed those experts? What else could you, as a person trying to get the best possible assistance in a matter of great importance to you, what else could you do in the exercise of business care and prudence except to do just what Mr. Callan did? You would consult the best experts you could find and be sure they have nothing to gain by being wrong.

Now, it's clear that Mr. Callan's attorneys in the flood case had nothing to gain by being wrong but they could lose a lot of valuable time. Actions speak louder than words. They acted their opinion because they did a lot of work in the case. You heard how Mr. Callan himself did a lot of work in the case, and he conferred numerous times with the attorneys, going over all the facts in the case. And he believed his attorneys and engineers that he would recover his damages.

Now, what happened after that? Mr. Callan and his attorneys diligently prosecuted the case. They were delayed in getting to trial by the County demurrers, but they did get to trial in 1946, and Mr. Callan won a substantial verdict of $80,000 from a jury. You are a jury. This was a jury just like yourselves; people like yourselves decided Mr. Callan was entitled to $80,000 in damages because the Flood Control District was negligent.

Now, it is true that the court finally granted a motion for a new trial, so they would have to try the case over. That is all they decided, that the case would be tried over again. And before they could try the case over again there was an appeal and the

principal trial attorney died. So they decided to settle the case at a reduced figure.

Doesn't this history show you that Mr. Callan did have a bona fide case and it was diligently pressed?

* * * * *

Mr. McHale: The undisputed facts, I think, are clear. The Government doesn't dispute at all that Mr. Callan had a very grievous loss in 1938 by reason of the flood. Whether it was the Act of God, an act of nature or whether there was some negligence on the part of the Los Angeles Flood Control District or whether it was the blame of some party or parties, that was a matter that was determined over across the street in the Superior Court.

The houses were two big houses, the one he lived in and the other one at 1723 Rancho, and they were completely washed away and destroyed. There is no doubt about that. We don't contest that. The amount of his damages were known to Mr. Callan in 1938.

The flood occurred on March 2nd. By the end of that year he had innumerable conferences with engineers and lawyers and he knew what his loss was. In fact, by the end of the year he filed a claim against the Los Angeles County Flood Control District for reimbursement because he thought—his advisors, lawyers and engineers, thought maybe that the Flood Control District was to blame for his houses being washed away, and he filed a claim. And before the end of the year, December 1938, before he filed his income tax return for 1938, the County denied that claim. The County Flood Control District said, "It is not our fault."

Mr. Callan had no insurance. In fact, he had no claim for reimbursement against anyone else. There was no contract; no contract of sale of the house or leasing or anything under which any other person would have been obligated in any way to pay Mr. Callan by reason of this loss. In other words, he had an unreimbursed loss. His only chance of recovery at the end of 1938 was to sue the Los Angeles Flood Control District. Mr. Callan did sue the Los Angeles Flood Control District.

We should look at this the way Mr. Callan looked at it in 1938, because to be frank in 1938 Mr. Callan didn't know what the progress of this thing was; how successful his suit would be. His lawyers took it on a contingency. Now, the attorney was called, the attorney for one of the parties in this suit, and stated that it is a common practice among lawyers in this community that negligence suits—and this is a negligence suit, a suit against the County for negligence—are handled on a contingency basis; that is how the lawyers handle these suits, they take a portion of the recovery that they get. In other words, they gamble on the thing. So they took, I believe the evidence showed, a 25 per cent contingency fee for this. And so the suit proceeded. And he sues this claim, which was known to him, the amount he had thoroughly investigated, and he knew what the property was worth and knew what he was suing the county for and his claim was for $220,000 some odd dollars and cents. His suit was finally determined in 1948. The final summation of the suit was settled, after a long and arduous proceeding through the

courts, for around $8400; less than four per cent of the amount he sued for. And you know that his damage was great. I mean, somewhere near the $220,000 figure.

So if we look at it from the point of view of hindsight we see that Mr. Callan's claim for reimbursement—and all it was was a cause of action or lawsuit—you have got a four per cent recovery by settling at the very end, which you might say was a nuisance settlement. At least, I think you can use your judgment and say that four per cent is not a very adequate recovery.

Now, you can take into account how Mr. Callan would have treated this, should have treated this on his 1938 income tax return as a reasonable and prudent man. Now, if Mr. Callan—and Mr. Callan, I think the facts show, is a reasonably wealthy man with several sources of income, and during these years he had considerable income—if a man has substantial income and he has a loss that he knows is definite and certain and can use that loss to offset his income, and he knows the amount of it—and there is no question that the houses had been destroyed in the year—as a reasonable and prudent man wouldn't he use that in the year in which the loss occurred? Or would he put it off until some future year until maybe he would recover something and maybe he wouldn't? If he puts it to a future year, if he recovers something, recovers the amount of his loss, why, he will never get a loss at all. But if he puts it over to a future year and he doesn't recover what he is suing for, he might get a loss. And he

doesn't know what his income will be in the future year and when that will occur. And when in 1938 he filed a tax return, his thought is, "What is my loss now?" Now, as a reasonable and prudent man, a man of business, shouldn't he deduct that loss in 1938? I think you will agree a reasonable and prudent man would do that.

Now, why didn't Mr. Callan deduct that loss in 1938? It is a stipulated fact, ladies and gentlemen of the jury, that Mr. Callan already had a loss in 1938. That is the reason why Mr. Callan didn't deduct it in 1938, we submit. But a reasonable man, a reasonable and prudent man would have taken that loss then because that is the standard that we use.

* * * * *

Mr. Miller: Ladies and gentlemen, I just want to reply as briefly as I can to some of the statements in Mr. McHale's argument which I think are perhaps incorrect, or perhaps misleading—not intentionally so.

Now, you heard Mr. McHale mention the fact that the claim had been denied by the City near the end of 1938, and, ladies and gentlemen,——

Mr. McHale: May I correct that? I think I said the County Flood Control District.

Mr. Miller: All right.

And you heard me ask Mr. Callan and Mr. Lee both what their opinion was of their prospects of recovery at the end of 1938, which was after this so-called denial of claims, and they both said emphatically that they had every expectation of making the recovery. So that this did not make any differ-

ence in the opinion of anyone of the merits of the case. It was merely a procedural formality which the law requires before a plaintiff can bring his court action against a governmental agency.

We filed a refund claim in this action in order to comply with the procedure for coming to court in this case.

Now, Mr. McHale mentions the fact that he states attorneys customarily handle negligence cases on a contingency basis. It is true that some negligence cases are handled on a contingency basis. But I think you, as reasonable people, will conclude that an attorney is not going to handle a case on a contingency unless he thinks he has a pretty good chance of recovery. And certainly you must believe that he has nothing to gain by being wrong about the case. If he takes it on a contingency he can lose. I should say he could gain nothing except experience, and he can lose a lot of time.

Now, Mr. McHale mentions the fact that the case was finally settled in 1948 for some $8000 odd dollars. Nevertheless, the fact remains that the jury, people like yourselves, heard all the evidence in the case and they decided the Flood Control District was ngligent and that Mr. Callan was entitled to recover $80,000. I think that speaks for the merits of the case.

Now, Mr. McHale has referred to the matter of whether a reasonable and prudent man would have deducted upon his 1938 return for this damage. Now, I want to ask you whether it is reasonable to conclude that this case was some kind of a tax maneuver

when Mr. Callan actually got a verdict of $80,000 in the case. And I would like to ask you whether there can be any doubt that his attorneys had a reasonable basis for their belief and advice to him in 1938 that he would recover.

I think the answer to those questions must be obvious, ladies and gentlemen; that this was a valid cause of action, a good claim for recovery, which Mr. Callan and his attorneys reasonably thought they would recover upon and which they did in fact make some recovery, and should have recovered a lot more but the chief trial counsel died before they could try it over again.

Now, Mr. McHale refers to the case of Mr. Callan and going in a high income bracket. Now, I think it is a matter of common knowledge that the brackets were a lot lower in 1938 than they are today. The taxes didn't really assume a very important part in the conduct of most people's business affairs. Mr. Callan's tax man told him, after the case had been instigated, had been filed in court, which was about February 1939, he went over to sign his tax return and Mr. Monroe, who had just prepared all these things and Mr. Callan simply signed them, said he couldn't take the loss because the suit for recovery had been filed and therefore he was not allowed to deduct that loss.

* * * * *

[Endorsed]: Filed July 11, 1955.

[Endorsed]: No. 14817. United States Court of Appeals for the Ninth Circuit. Robert Riddell, Collector of Internal Revenue, and Harry C. Westover, former Collector of Internal Revenue, Appellants, vs. Earl Callan and Helen W. Callan, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: July 13, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14817

ROBERT RIDDELL and HARRY C. WESTOVER, Appellants,

vs.

EARL CALLAN and HELEN W. CALLAN, Appellees.

APPELLANTS' STATEMENT OF POINTS

Pursuant to the provisions of Rule 17(6) of the rules of the United States Court of Appeals for the Ninth Circuit, Appellants hereby adopt Appellants' Statement of Points to be Relied upon on Appeal, which was filed in the District Court, as their state-

ment of the points upon which they intend to rely in this Court.

Dated: This 15th day of July, 1955.

LAUGHLIN E. WATERS,
United States Attorney

EDWARD R. McHALE,
Asst. U. S. Attorney, Chief, Tax Division

/s/ EDWARD R. McHALE,
Attorneys for Appellants

[Endorsed]: Filed July 16, 1955. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLANTS' DESIGNATION OF RECORD

Pursuant to Rule 17(6) of this Court, Appellants hereby designate the following parts of the record which Appellants believe necessary for consideration of the points upon which they intend to rely in this appeal, and which they desire to be printed, omitting the title of court and cause from each of the documents designated for printing unless otherwise directed (the page on which each document designated commences in the original certified record is shown in brackets):

1. Complaint [2];
2. Notice of Motion and Motion to Dismiss, filed October 1, 1952 [42];

3. Stipulation and Order Allowing Amendment of Complaint and Submitting the Motion to Dismiss on the Amended Complaint, filed October 27, 1952 [63];

4. Order on Motion to Dismiss, filed October 30, 1953 [66];

5. Answer to Amended Complaint, filed November 18, 1953 [88];

6. Stipulation of Facts, filed January 28, 1955 [Plaintiffs' Exhibit 33];

7. Stipulation of Issues to be Tried, filed January 28, 1955 [98];

8. Defendants' Request for Instructions 1 to 15, filed February 8, 1955, except omit from printing and consideration on appeal Instructions 12, 13, 14 and 15 [101];

9. Instructions to the Jury given February 10, 1955, filed February 10, 1955 [124];

10. Special Verdict, filed February 10, 1955 [151];

11. Judgment, filed and entered February 16, 1955 [156];

12. Motion for Judgment Notwithstanding Verdict to the Contrary, or in the Alternative, Motion for Partial New Trial, filed February 21, 1955 [160];

13. Order Denying Defendants' Motion for Judgment Notwithstanding Verdict to the Contrary, and Denying Defendants' Alternative Motion for Partial New Trial, filed March 7, 1955 [168];

14. Notice of Appeal, filed April 15, 1955 [171];

15. Motion for Extension of Time to Docket

Cause on Appeal and Order, filed May 20, 1955 [173];

16. Appellants' Designation of Contents of Record on Appeal (Dist. Ct.) [176].

17. Appellants' Statement of Points Upon Which They Intend to Rely on the Appeal [179];

18. Minutes of Court dated June 11, 1952 [38];

19. Minutes of Court dated October 13, 1952 [46];

20. Minutes of Court dated October 15, 1952 [60];

21. Minutes of Court dated September 28, 1953 [61];

22. Minutes of Court dated October 1, 1953 [62];

23. Minutes of Court dated February 8, 1955 [119];

24. Minutes of Court dated February 9, 1955 [120];

25. Minutes of Court dated February 10, 1955 [123];

26. Reporter's Partial Transcript of Proceedings, February 9 and 10, 1955, pages 1 to 14;

27. Reporter's Partial Transcript of Proceedings, February 9 and 10, 1955, pages 1 to 63, except omit from printing and consideration on appeal that portion thereof commencing line 7, page 20 through line 17, page 22, and from line 6, page 31, through line 4, page 42;

28. The following portions of the proceedings in case No. 13357-WM, Earl Callan, Plaintiff, vs. Harry C. Westover, Defendant, in which instances

Appellants desire the title of court and cause to be printed:

(a) Notice of Motion to Dismiss filed April 4, 1952 [32];

(b) Order on Defendant's Motion to Dismiss, filed September 18, 1952 [39];

(c) Stipulation and Order for Submitting Motion to Dismiss Amended Complaint on Memoranda Previously Filed [65];

(d) Memorandum of Decision filed October 30, 1953 [67];

(e) Stipulation and Order for Dismissal with Prejudice filed and entered February 16, 1955 [155];

29. Acknowledgment of receipt of service of Appellants' Designation of Contents of Record on Appeal, and Statement of Points to be Relied Upon on Appeal [183];

30. Stipulation Regarding Contents of Record on Appeal [184];

31. Certificate of Clerk;

32. Appellants' Statement of Points to be Relied Upon on Appeal (Court of Appeals);

33. Appellants' Designation of Parts of Record Necessary for Consideration on Appeal and to be Printed.

Dated: This 15th day of July, 1955.

LAUGHLIN E. WATERS,
United States Attorney
EDWARD R. McHALE,
Asst. U. S. Attorney, Chief,
Tax Division

/s/ EDWARD R. McHALE,
Attorneys for Appellants

[Endorsed]: Filed July 16, 1955. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF RECORD

Pursuant to Rule 17(6) of this Court, Appellees hereby designate the following additional parts of the record which Appellees believe necessary for consideration of this appeal, and which they desire to be printed, omitting the title of court and cause from each of the documents designated for printing unless otherwise directed (the page on which each document designated commences in the original certified record is shown in parentheses):

1. Appellees' Designation of Contents of Record on Appeal, filed July 11, 1955, (Dist. Ct.) (p. 186).
2. Reporter's Partial Transcript of Proceedings February 10, 1955, pages 1 to 11, line 15, inclusive, and pages 13 to 15, line 16, inclusive.
3. Appellees' Designation of Parts of Record Necessary for Consideration on Appeal and to be printed.

Dated: This 20th day of July, 1955.

/s/ HERBERT S. MILLER,
Attorney for Appellees

No. 14817

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT RIDDELL, COLLECTOR OF INTERNAL REVENUE, AND HARRY C. WESTOVER, FORMER COLLECTOR OF INTERNAL REVENUE,

Appellants,

vs.

EARL CALLAN AND HELEN W. CALLAN,

Appellees.

On Appeal From the Judgment of the United States District Court for the Southern District of California.

BRIEF FOR THE APPELLANTS.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

Miscellaneous

No. 14817

IN THE

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ROBERT RIDDELL, COLLECTOR OF INTERNAL REVENUE, AND HARRY C. WESTOVER, FORMER COLLECTOR OF INTERNAL REVENUE,

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vs.

EARL CALLAN AND HELEN W. CALLAN,

Appellees.

On Appeal From the Judgment of the United States District Court for the Southern District of California.

BRIEF FOR THE APPELLANTS.

Opinion Below.

The memorandum of the District Court in the companion case of *Earl Callan v. Westover* denying defendants' motion to dismiss [R. 55-73], also applicable to this case, is reported at 116 F. Supp. 191.

Jurisdiction.

This appeal involves income taxes for the years 1946 and 1948. The taxes in dispute were paid on February 5, 1951. [R. 12, 115.] Claims for refund were filed on August 14, 1951. [R. 17, 35, 77, 82.] More than six

months elapsed from the date of filing of the claims without the Commissioner rendering a decision thereon, nor disallowing the claims. [R. 18, 36, 77, 83.] Within the time provided in Section 3772 of the Internal Revenue Code of 1939, and on March 10, 1952, the taxpayers brought an action in the District Court for recovery of the taxes paid. [R. 3-38.] Jurisdiction was conferred on the District Court by 28 U. S. C., Section 1340. The judgment was entered on February 16, 1955. [R. 112-115.] Within sixty days and on April 15, 1955, a notice of appeal was filed. [R. 121-122.] Jurisdiction is conferred on this Court by 28 U. S. C., Section 1291.

Question Presented.

Whether a loss caused by the destruction of taxpayer's property by flood in 1938 was sustained in that year or was sustained in 1948 when taxpayer's claim against the Los Angeles County Flood Control District was settled.

Statutes and Regulations Involved.

Revenue Act of 1938, c. 289, 52 Stat. 447:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * * * * *

(e) *Losses by Individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

* * * * * * * *

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * * * * *

(e) *Losses by Individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

* * * * * * * *

(26 U. S. C. 1952 ed., Sec. 23.)

Treasury Regulations 101, promulgated under the Revenue Act of 1938:

Art. 23(e)-1. *Losses by individuals.*—

* * * * * * * *

In general losses for which an amount may be deducted from gross income must be evidenced by closed and completed transactions, fixed by identifiable events, bona fide and actually sustained during the taxable period for which allowed. Substance and not mere form will govern in determining deductible losses. Full consideration must be given to any salvage value and to any insurance or other compensation received in determining the amount of losses actually sustained. See section 113(b).

* * * * * * * *

Treasury Regulations 111, Sec. 29.23(e)-1, promulgated under the Internal Revenue Code of 1939, contain identical language.

Statement.

Taxpayer,[1] in February and March, 1938, was the owner of an undivided one-half interest in two parcels of improved real estate, located at 1740 Riverside Drive and 1723 Rancho, Los Angeles. [R. 88-89.] The adjusted cost basis, equal to the fair market value, of his interest in 1740 Riverside Drive was $29,907.50, and of his interest in 1723 Rancho was $13,272. [R. 89-91.] He also owned furniture and furnishings at the two addresses totalling $41,754.25 and personal effects of the value of $3,855. [R. 90-91.]

On March 2, 1938, the Los Angeles River suddenly overflowed its channel and caused a flood which entirely washed away and destroyed the houses, other improvements, furniture and other personal property on these two lots, so that the aggregate value of taxpayer's interest in the lands after the flood was $2,000. Taxpayer had no insurance or other right to reimbursement for damages except his rights, if any, against the Los Angeles County Flood Control District. [R. 92.]

On May 31, 1938, he filed a claim with the district in the amount of $220,740 for reimbursement for the foregoing and other damages. This claim was denied by the Los Angeles Flood Control District in December, 1938. Taxpayer then filed suit against the district in February, 1939, in the Superior Court in and for the County of Los Angeles. He obtained a jury verdict in the amount of $80,000, and judgment was entered for that amount

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[1]For purposes of this brief Earl Callan will be referred to as the taxpayer. The other taxpayer, Helen Callan, his present wife, owned no interest in the property damaged in 1938. [R. 88.]

on March 27, 1946. The flood control district filed a motion for a new trial, which was granted by the Superior Court, and the court's order for a new trial was affirmed on appeal. The new trial was never held, and in 1948 taxpayer entered into a settlement with the flood control district. His net recovery, after payment of attorneys' fees and costs and of $4,201.53 to his former wife, was $4,201.53. [R. 92-94.]

Taxpayer did not deduct any part of the loss from the flood on his income tax return for the year 1938. For that year because of other deductions, taxpayer had a net loss of approximately $1,700, and therefore, no tax payable. [R. 96.]

In the present suit it is stipulated that the loss, except for that held to be properly sustained and deductible in 1938, shall be deemed to be loss sustained by the taxpayer in the year 1948. [R. 85, 97.]

In this action taxpayer's complaint [R. 3-37], filed March 10, 1952, set out the facts of the flood and of the litigation against the flood control district, and, with reference to the year 1938 stated that [R. 7]:

> From and after the time of said flood and continuously thereafter during the year 1938, plaintiff strongly believed and was advised by his attorneys that he could obtain reimbursement for his loss by legal action against the Los Angeles County Flood Control District.

After the court granted the Collector's motion to dismiss [R. 38-44] in the similar case of *Earl Callan v. Westover,* Civil No. 13,357-WM, relating to the taxable years 1944, 1945, and 1946 [R. 45-46], taxpayer amended his com-

plaint by inserting after the words quoted above the following language [R. 53]:

> * * * and in fact had a reasonable chance at the end of the year 1938 to obtain said reimbursement and possibly a profit.

The court on October 30, 1953, denied the Collector's motion to dismiss the amended complaint, in its memorandum of decision in the companion case [R. 55-73] stating in relevant part that [R. 72]:

> In my opinion the allegations *inter alia* in the amended complaint that plaintiff "strongly believed and was advised by his attorneys that he could obtain reimbursement for the damages to his property by legal action against the Los Angeles County Flood Control District and in fact had a reasonable chance at the end of the year 1938 to obtain said reimbursement" sufficiently tender an issue of ultimate fact for trial by jury as plaintiff has demanded. * * *
>
> The issue thus tendered is whether, in the light of all of the surrounding circumstances, plaintiff exercised ordinary business care and prudence in delaying deduction of loss until the taxable year 1946.

At the trial taxpayer introduced testimony and other evidence that engineers and attorneys advised him that the flood control district was negligent and that he would recover, and that he believed he would recover. [Not printed, but referred to at R. 185-187, 189, 191.]

In its instructions to the jury on this issue [R. 160-163] the court below stated that the issue was whether in the light of all the surrounding circumstances taxpayer exercised ordinary business care and prudence in delaying

deduction of his loss until 1948, stating in part that [R. 161-162]:

> In this connection the jury should consider, along with other surrounding circumstances shown by the evidence: (1) the date of the physical loss; (2) whether plaintiff Earl Callan made a full and fair disclosure of the facts to an attorney and thereafter reasonably and in good faith followed and relied upon the advice of his counsel; the jury may also consider the success or lack of success of plaintiff Earl Callan in the prosecution of his claim against the Flood Control District; (3) whether plaintiff Earl Callan prosecuted his claim against the Flood Control District in good faith that he had a reasonable chance of recovering on his claim against the Flood Control District.

The following question was submitted to the jury [R. 113, 168]:

> Question 1: "Was plaintiff Earl Callan's loss from the March 2, 1938 flood finally and entirely sustained and deductible by him in 1938 or 1948?"

The jury found the answer to be 1948, and judgment was entered for taxpayer accordingly. [R. 113-115.]

Statement of Points to Be Urged.

1. The District Court erred in denying appellants' motion to dismiss the amended complaint;

2. The District Court erred in denying appellants' motion for directed verdicts on question No. 1;

3. The District Court erred in instructing the jury [R. 160-161], to wit:

> The law permitted plaintiff Earl Callan nonetheless to delay claiming a tax deduction for the loss while

pursuing his claim against the Flood Control District, if to do so would be the exercise of ordinary business care and prudence under all the surrounding circumstances.

4. The District Court erred in instructing the jury [R. 163], to wit:

> If the jury should find from the evidence, as plaintiffs contend, that plaintiff Earl Callan did exercise ordinary business care and prudence in delaying deduction of the loss in question for income tax purposes until his claim against the Los Angeles County Flood Control District was finally settled in 1948, then the jury should find that the loss for income tax purposes was not finally and entirely sustained, and so did not become properly deductible, until the year of settlement—the year 1948.

5. The District Court erred in instructing the jury [R. 165], to wit:

> * * * you have two years here, 1938 and 1948, and if you find that the plaintiff exercised reasonable care, business care and prudence in postponing the loss until 1948, he is entitled to deduct it whether this is a residential property or a business property.

6. The District Court erred in submitting to the jury the question [R. 168], to wit:

> Question 1: Was plaintiff Earl Callan's loss from the March 2, 1938 flood finally and entirely sustained and deductible by him in 1938 or 1948?

7. The District Court erred in instructing the jury [R. 168-169], to wit:

> So, you are called upon to find, under the instructions, whether plaintiff Earl Callan acted with reason-

able business care and prudence in postponing claiming the deduction from 1938 when the physical loss occurred until 1948 until after he settled his claim finally with the Flood Control District.

8. The District Court erred in leaving the issue as to the year in which the loss is deductible to the jury as a question of fact, and in instructing the jury that they should consider, along with other surrounding circumstances: the date of the physical loss; and whether the taxpayer made a full and fair disclosure of the facts to an attorney and thereafter reasonably and in good faith followed and relied upon his advice; and the success or lack of success of the prosecution of his tort claim; and whether the taxpayer prosecuted his tort claim in good faith that he had a reasonable chance of recovery.

9. The District Court erred in not instructing the jury that where, as in this case, a physical loss has occurred which is not compensated for by insurance, the fact that the taxpayer asserts a disputed tort claim does not postpone the year in which the loss is to be taken; that a disputed tort claim is too contingent to warrant such postponement.

10. The District Court erred in not directing a verdict for the appellants on the issue as to the year in which the loss is deductible.

11. The District Court erred in not directing the jury to find that the loss is deductible only for 1938.

12. The District Court erred in not granting appellants' motion for judgment notwithstanding the verdict and for partial new trial.

13. The District Court erred in entering judgment for the appellees.

14. The District Court erred in denying appellants' motion for judgment of dismissal under Rule 41(b) at the close of appellants' case. [R. 173, 177-178.]

15. The District Court erred in failing to give appellants' proposed instruction No. 4. [R. 102-103.]

16. The District Court erred in failing to give appellants' proposed instruction No. 5. [R. 103.]

Summary of Argument.

Under the Internal Revenue Code an individual may deduct losses sustained during the taxable year and not compensated for by insurance or otherwise. As a corollary, he may not deduct a loss in a year other than that in which it was sustained.

The loss here in question was caused by a flood which in March, 1938, completely destroyed taxpayer's property. It was not compensated for by insurance. Taxpayer had a claim for damages against the Los Angeles County Flood Control District on which he in 1938 reasonably and in good faith believed he would recover. The district denied his claim in that year and contested any liability. On these facts, if the loss was sustained in 1938, taxpayer's tort claim was too contingent and speculative to be compensation for the loss. Both the fact of any recovery and its amount were unpredictable.

Nor does the fact that taxpayer had such a claim mean that the loss was not sustained in 1938. The physical destruction was complete in 1938; the extent of the damage to the property was known—it had totally lost its

value. This is not a case like embezzlement, where the loss may be unknown to the taxpayer. Nor is it a case of a business loss, where the diminution of value in stock, the collectibility of a debt, or the chance of pulling through a doubtful contract, depend on business events and the impact of numerous economic factors. In those cases identification of the moment when the intangible property has ceased to have value and accordingly when a loss has been sustained calls for the exercise of sound business judgment, guided by neither undue optimism nor undue pessimism. There can be a limited discretion as to fixing upon the identifiable event that marks the moment of loss.

In the present case there is no room for such discretion. The flood occurred, the property was destroyed, and the loss was sustained. There was no occasion to exercise judgment.

Even if the same guides are to be applied in determining the time of a physical loss as of a business loss, once the event causing the loss has been identified, the fact that a claim for damages exists, or even that later recovery is had on that claim, does not result in the loss not having been sustained. The problem, on the occasion of business losses, has been to identify the events which mark the loss. Once they have been determined, the claim for damages has been regarded as irrelevant. Here there has been no problem in identifying the event; the claim for damages is entitled to no greater attention than in the case of business losses.

ARGUMENT.

Taxpayer Sustained a Loss, Not Compensated for by Insurance or Otherwise, When His Property Was Destroyed by Flood in 1938, and Not in 1948, When His Claim for Damages Was Settled.

The facts in this case are not here in dispute. They were stipulated or must be deemed found by the jury under the instructions given. They are in essence that taxpayer's property was destroyed by flood in 1938, and the Flood Control District in 1938 denied any liability to compensate him, but taxpayer reasonably and in good faith relied on the advice of counsel and believed in good faith at the close of 1938 that he had a reasonable chance of recovering on his claim against the Flood Control District.

We submit that under such facts the law does not authorize deferring the deduction from the year of destruction of the property until a later year. Under Section 23(e) of the Revenue Act of 1938 *(supra),* applicable to the year 1938, identical in this respect with Section 23(e) of the Internal Revenue Code of 1939 *(supra),* applicable to the year 1948, an individual may deduct "losses sustained during the taxable year and not compensated for" by insurance or otherwise. It is perfectly plain that a loss here was sustained in 1938, when the property was destroyed by flood. This is not a case where there may be doubt as to whether property, tangible or intangible, has lost its market value in a particular year, where there may be ground for differences of opinion based on reasonable business judgment. On the contrary the property involved—houses, swimming pool, other improvements, furniture, clothes—had been wiped out of existence, finally and completely.

It is hardly necessary to refer to the Regulations *(supra),* cited with approval in *Boehm v. Commissioner,* 326 U. S. 287, 292, which clarify the meaning of the words "losses sustained" by stating that in general they must be evidenced by "closed and completed transactions, fixed by identifiable events, bona fide and actually sustained during the taxable period for which allowed." The Regulations are helpful in determining the time of loss in business transactions; they merely confirm the obvious in a case such as this.

If the loss was sustained during the year 1938, the only question under the statute is whether the loss may be said to be "compensated for" because taxpayer reasonably believed that he could recover damages in a tort action against the Flood Control District. Or, under the Regulations, was his claim and cause of action "compensation received" to be considered in determining the amount of the loss? We believe that a cause of action for negligence, with the defendant vigorously contesting liability, no matter how reasonable or *bona fide* the opinion of the taxpayer as to his eventual success, cannot be said to be compensation for the complete physical destruction of taxpayer's property.

The issue under Section 23(e) is whether a loss was in fact sustained. A taxpayer cannot choose the year in which he wants to take a deduction. *United States v. Ludey,* 274 U. S. 295. The determination is to be made as of the year 1938. *Burnet v. Sanford & Brooks Co.,* 282 U. S. 359. Under these established rules the issue here is pointed up if we assume that taxpayer had claimed his loss in 1938, and the Commissioner had disallowed the deduction, holding that there was no loss so long as a claim for damages existed which the attorneys here in-

volved declared had a reasonable chance of success. We believe it clear that the courts would uphold the taxpayer. *Cahn v. Commissioner,* 92 F. 2d 674 (C. A. 9th). But the rule works both ways. A taxpayer may deduct his loss in the year it is sustained; he cannot deduct it in any other year. The same standards are to be applied regardless of whether in a particular case they work to the advantage of the taxpayer or operate in favor of the Government.

The inappropriateness of holding this tort claim to be "compensation" to taxpayer here, who reported on the cash basis, is illustrated by the fact that it would not be considered income even to an accrual basis taxpayer. See *H. Liebes & Co. v. Commissioner,* 90 F. 2d 932, 937 (C. A. 9th). Even a claim for just compensation based on the Constitution and federal statutes would not be income. *Commissioner v. Henry Hess Co.,* 210 F. 2d 553 (C. A. 9th). Nor would a claim based on war contract termination by the Government bar the deduction of a loss. *Sharp v. Commissioner,* 224 F. 2d 920 (C. A. 6th).

A claim for damages is not deductible by the defendant where the amount of damages, if any, is wholly unpredictable and liability is denied. *Lucas v. American Code Co.,* 280 U. S. 445, 451. Conversely, it cannot be income or compensation to the plaintiff. See *Commissioner v. John Thatcher & Co.,* 76 F. 2d 900 (C. A. 2d); *Hinrichs v. Helvering,* 95 F. 2d 117 (C.A. D.C.).

As we read the opinion of the court below it did not hold that there was a loss sustained in 1938 which was compensated for (or could be so found by a jury) by the claim for damages. The court did not so hold, and in

the light of the foregoing discussion we do not believe it could have considered such claim as compensation. If it had so held, it would have been in error.[2] Rather, we construe the opinion and the court's instructions as holding that no loss was sustained at all (regardless of whether or not it was compensated for) if the taxpayer, reasonably relying on his claim and in the exercise of ordinary business care, chose not to treat the loss as a closed and completed transaction, fixed by an identifiable event. [R. 66, 68, 160-163.] This holding is equally erroneous.

Whatever the scope to be given to a taxpayer's business judgment in continuing business transactions, in weighing many factors to determine when a loss is sustained, see *Lewellyn v. Elec. Reduction Co.,* 275 U. S. 243, 246-247; *First Nat. Corp. v. Commissioner,* 147 F. 2d 462 (C. A. 9th); *Douglas County Light & Water Co. v. Commissioner,* 43 F. 2d 904, 905 (C. A. 9th); *Clark v. Welch,* 140 F. 2d 271 (C. A. 1st); *Belser v. Commissioner,* 174 F. 2d 386 (C. A. 4th), the reasons for giving even a limited discretion to the taxpayer have no applicability to a case where an obvious physical loss has been sus-

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[2]If, however, this Court should disagree, and should decide that this was a proper question to be submitted to the jury, we believe the court below erred in failing to give proposed Instruction No. 4 [R. 102-103] as follows:

> You are to determine whether plaintiff Earl Callan's claim for reimbursement against the Los Angeles County Flood Control District for damages due to claimed negligence by the District and which had been denied by the District at the close of 1938 was "compensation by insurance or otherwise" and thus served to postpone the loss until the amount thereof, if any, was finally determined, as plaintiffs contend, or whether said claims for damages were too contingent and uncertain to be treated as compensation by insurance or otherwise for the loss, as defendants contend.

tained. Even in a case where there was no physical loss, the claim would not justify deferring the loss. In *Boehm v. Commissioner,* 326 U. S. 287, taxpayer had a claim for damages to the value of her stock which resulted in 1937 in a settlement in which she received more than a third of the purchase price of the stock. The Court held that the existence of the lawsuit did not defer the loss until 1937, the worthlessness of the stock having been established by "identifiable events" occurring long prior to 1937.

In *United States v. White Dental Co.,* 274 U. S. 398, 401, holding that a loss occurred when taxpayer's subsidiary was seized by the German Government in 1918, even though it had later been awarded damages by the Mixed Claims Commission, the Court pointed out that the statute and Regulations—

> contemplate the deduction from gross income of losses, which are fixed by identifiable events, such as the sale of property (Art. 141, 144), or caused by its destruction or physical injury (Art. 141, 142, 143) or, in the case of debts, by the occurrence of such events as prevent their collection (Art. 151).

This language contemplates a different test for losses caused by physical destruction from that for losses which have to be shown by events. Similarly, in *Lewellyn v. Elec. Reduction Co.,* 275 U. S. 243, 247, the Court mentioned as obviously dissimilar from a loss incurred in business transactions one caused by the burning of a house. There may be occasion for the exercise of "business care and prudence" [R. 161] to determine when stock has become worthless, or when a debt is uncollectible, or when a contract should be abandoned. There is no occa-

sion to exercise judgment to determine when a flood has destroyed a house.

We believe that the court below was led into error by certain language [R. 62, 64-66] from *Boehm v. Commissioner, supra,* and *Alison v. United States,* 344 U. S. 167, taken out of the context of those cases, and interpreted by the court as modifying previously established principles.

In the *Boehm* case, the question was as to the year in which shares of stock became worthless. The Court (p. 292) rejected taxpayer's "subjective test" as to when the stock became worthless, "said to depend upon the taxpayer's reasonable and honest belief as to worthlessness, supported by the taxpayer's overt acts and conduct in connection therewith." The Court said this test could not be used "as the controlling or sole criterion," that the loss, to be deductible, "must have been sustained *in fact* during the taxable year." The Court went on to say that all pertinent facts and circumstances are to be considered, "regardless of their objective or subjective nature," and (p. 293) that the taxpayer's "attitude and conduct are not to be ignored," but are not to be the decisive factor in every case.

The Court there was referring to the test for determining when stock became worthless, a question necessarily calling for the exercise of judgment on the part of the taxpayer, as well as later by the courts. There is no occasion for the exercise of any judgment, subjective or objective, as to the date on which the Los Angeles River destroyed taxpayer's property. The issue which concerned the Court in the *Boehm* case does not even arise in the present one.

Even if the language in the *Boehm* case is considered applicable here, it should be noted that the Court, having found "identifiable events" to show the worthlessness of the stock prior to 1937, did not regard the claim for damages against a third party for destruction of the value of the stock as rendering them any less identifiable. *A fortiori,* a claim for damages cannot render uncertain the time of loss arising from such a fixed event as a flood which completely destroyed the property.

Furthermore, even if inquiry into taxpayer's good faith opinion as to the value or merit of his claim in 1938 is permissible, we submit that the instructions of the court below when read in context [R. 160-163] violate the warning of the *Boehm* case by making that inquiry controlling and decisive.

Alison v. United States, 344 U. S. 167, held that embezzlement losses can be held to have occurred in the year in which the embezzlement is discovered. The Court emphasized (p. 169) "the special nature of the crime of embezzlement," whose essence is secrecy. It is different from the usual case where taxpayers are "well aware of all the circumstances of financial losses." The Court carefully limited its holding to that special case, and there is no suggestion that it intended to lay down a rule departing from its earlier decisions as to the year in which losses are sustained.

It may be noted that in the *Boehm* case not only was the fact that a claim for damages existed not considered

sufficient to prevent the loss from being sustained, but also the fact that it resulted in a later recovery was considered irrelevant. This application to losses of the broader principle of annual accounting periods has been the general rule. See *Cahn v. Commissioner,* 92 F. 2d 674 (C. A. 9th); *Rhodes v. Commissioner,* 100 F. 2d 966 (C. A. 6th); *Sharp v. Commissioner, supra; Niagara Share Corp. v. Commissioner,* 82 F. 2d 208 (C. A. 4th); *United States v. White Dental Co., supra.* In the present case, however, the court instructed the jury [R. 161-162] that it could consider "the success or lack of success" of taxpayer in the prosecution of his claim. This was erroneous.

The narrow issue here involved, whether deduction of a physical loss may be deferred until a future year because of the existence of a claim for damages, was presented in *Commissioner v. Highway Trailer Co.,* 72 F. 2d 913 (C. A. 7th), certiorari denied, 293 U. S. 626. There the taxpayer suffered a fire loss in 1921, but claimed that the loss was due to the negligence of another party. The court held that the loss occurred in the year of the fire and not in the later year when it became established that taxpayer would not recover for that part of the loss not compensated for by insurance. *Cf. Commissioner v. Harwick,* 184 F. 2d 835 (C. A. 5th); but see *Cahn v. Commissioner, supra.*

We submit that on the facts set out in the complaint or as brought out at the trial, the loss in question was as a matter of law sustained in 1938 and not then compen-

sated for by insurance or otherwise. Accordingly, the court below erred in denying the motion to dismiss the amended complaint, in denying the motion for directed verdicts on this question, in not directing a verdict for the appellants, in not directing the jury to find that the loss is deductible only for 1938, and in denying the motion for judgment notwithstanding the verdict and for partial new trial.

If this Court should disagree and should hold that there is a question for the jury as to whether the loss was sustained in 1938 and was not compensated for by insurance or otherwise, we urge that the case should be remanded for a new trial, under proper instructions. The instructions given were erroneous in giving controlling weight to taxpayer's state of mind, and in making relevant to the question of loss in 1938 the fact of partial recovery ten years later. Furthermore, if they can be taken to mean that a disputed tort claim is compensation, they are in conflict with settled rules as to what is compensation under the income tax law.

Furthermore the court below erred in refusing to give requested Instruction No. 5 [R. 103] as follows:

> The loss of plaintiff Earl Callan was deductible in the year it was evidenced by a closed and completed transaction fixed by an identifiable event and bona fide and actually sustained during the taxable period.

This instruction, in the language of the Treasury Regulations, *supra,* which has received congressional and judicial approval (*Boehm v. Commissioner, supra*), was essential if the jury was to be properly advised as to the applicable law, and was not to give decisive weight to taxpayer's subjective opinion.

Conclusion.

The judgment of the court below should be reversed. If this Court believes that there is a question for the jury whether the loss was sustained in 1938 and not compensated for by insurance or otherwise, the case should be remanded for a new trial.

Respectfully submitted,

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November, 1955.

No. 14817

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT RIDDELL, Collector of Internal Revenue, and HARRY C. WESTOVER, former Collector of Internal Revenue,

Appellants,

vs.

EARL CALLAN and HELEN W. CALLAN,

Appellees.

On Appeal From the Judgment of the United States District Court or the Southern District of California.

BRIEF FOR THE APPELLEES.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

CASES PAGE

STATUTES

No. 14817

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BRIEF FOR THE APPELLEES.

Opinion Below.

The memorandum of the District Court in the companion case of *Earl Callan v. Westover* denying defendants' motion to dismiss [R. 55-73], also applicable to this case, is reported at 116 Fed. Supp. 191.

Jurisdiction.

This appeal involves income taxes for the years 1946 and 1948. The taxes in dispute were paid on February 5, 1951. [R. 12, 115.] Claims for refund were filed on August 14, 1951. [R. 17, 35, 77, 82.] More than six months elapsed from the date of filing of the claims

without the Commissioner rendering a decision thereon, nor disallowing the claims. [R. 18, 36, 77, 83.] Within the time provided in Section 3772 of the Internal Revenue Code of 1939, and on March 10, 1952, the taxpayers brought an action in the District Court for recovery of the tax paid. [R. 3-38.] Pleadings showing existence of the jurisdiction of the District Court under 28 U. S. C., Section 1340, are the Complaint [R. 3-38] and its Amendment [R. 52], and Answer to Amended Complaint. [R. 73-84.] The judgment was entered on February 16, 1955. [R. 112-115.] Within sixty days and on April 15, 1955, a notice of appeal was filed. [R. 121-122.] Jurisdiction is conferred on this Court by 28 U. S. C., Section 1291.

Question Presented.

Appellee would agree with appellant's statement of the question presented, except that this question arises in this appeal with the background that:

(1) It is stipulated in the present suit that the loss, except for that held to be properly sustained and deductible in 1938, shall be deemed to be loss sustained by the taxpayer in 1948 [R. 85, 97; App. Br. p. 5], and

(2) Pursuant to that stipulation, and under a form of verdict approved by both counsel [R. 113, 168], the jury in the court below found the loss was *not* sustained and deductible in 1938. [R. 113-114.]

The question presented is more accurately stated, therefore, as follows:

> "Did the court below err in its submission to the jury of this question: Whether a loss caused by the

destruction of taxpayer's property by flood in 1938 was sustained in that year or was sustained in 1948, when taxpayer's claim against the Los Angeles County Flood Control District was settled."

Statutes and Regulations Involved.

The legal effect and practical application of the statutes and regulations below must of course be determined by the judicial decisions interpreting them.

Revenue Act of 1938, c. 289, 52 Stat. 447:

Sec. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * * * * *

(e) Losses by Individuals.—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

* * * * * * * *

Internal Revenue Code of 1939:

Sec. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * * * * *

(e) Losses by Individuals.—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

* * * * * * * *

(26 U. S. C. 1952 ed., Sec. 23.)

Treasury Regulations 101, promulgated under the Revenue Act of 1938:

Art. 23(e)-1. Losses by individuals.—

* * * * * * * *

In general losses for which an amount may be deducted from gross income must be evidenced by closed and completed transactions, fixed by identifiable events, bona fide and actually sustained during the taxable period for which allowed. Substance and not mere form will govern in determining deductible losses. Full consideration must be given to any salvage value and to any insurance or other compensation received in determining the amount of losses actually sustained. See section 113(b).

* * * * * * * *

Treasury Regulations 111, Sec. 29.23(e)-1, promulgated under the Internal Revenue Code of 1939, contain identical language.

It is pertinent to note that examination of the legislative history of section 23(e) shows that it first became a part of the United States Revenue Laws in the Act of 1894, section 28, which allowed the deduction of losses by individuals "not compensated for by insurance or otherwise . . ." (See Seidman's *Legislative History of Federal Income Tax Laws* (1938), at page 1018.) These same words have been used by Congress in the same conjunction in every income tax law thereafter and through the taxable years in question.

Additional Statutes will be quoted in this brief where pertinent.

Statement.

It is appellee's position that determination of the tax year in which a loss is sustained is a question of fact; that Judge Mathes in the court below properly submitted that question to the jury, and properly instructed the jury.

Jury trial was properly demanded [R. 37], and this issue was stipulated to be tried. [R. 85.]

Appellant's Statement (App. Br. pp. 4-7) should be amplified by the following:

1. The court's memorandum of decision [R. 55-73] is relevant herein in its entirety.

2. The entire instructions to the jury [R. 160-163] on this fact issue are important, for example:

> ". . . the jury should consider all the surrounding circumstances as shown by the evidence . . ." [R. 161.]
>
> "The mere existence of a claim or suit for recovery against the Los Angeles County Flood Control District is not enough in and of itself to prevent the loss from being deductible in 1938.
>
> "A taxpayer may not reasonably postpone the deduction for loss until some later and possibly more tax advantageous year by pursuing unreasonably a claim for possible reimbursement for his loss, since a taxpayer is not allowed to pick and choose the year of loss for the sole purpose of gaining the most advantageous tax benefit." [R. 162.]
>
> "The . . . fact that no deduction was claimed . . . on . . . Callan's 1938 tax return may be considered in determining the issue as to whether or not he in good faith postponed claiming a tax deduction for the loss." [R. 162-163.]

3. The evidence introduced at the trial included not only the testimony concerning attorneys' and engineers' *advice* to plaintiff, but also testimony of the flood evidence presented to such attorneys and engineers, their fee arrangements with plaintiff, their personal belief in recovery, and plaintiff's own belief that he would recover. The evidence also included photographs of the properties and the flood, the death of the chief trial attorney in the flood case, testimony of advice from plaintiff's tax advisor in February, 1939, and a stipulation of facts. [Stipulation at R. 87-99, other evidence not printed but referred to at R. 184-193.]

Significant in the stipulation of facts [R. 93] is the evidence that in December, 1938, and at all material times thereafter, Appellee diligently prosecuted his case against the Los Angeles County Flood Control District.

In the court below, Appellant's counsel thoroughly argued to the jury the reasons for which he felt that jury should find for the defendants on the year of loss issue. [R. 188-189.]

Plaintiff's position was also argued to the jury, and proved more convincing to the jury. [R. 183-188, 191-193.]

The Stipulation of Facts [par. XXV, R. 99] provided in material part, and the jury verdict below [Question 2, R. 114] held in other material parts, that a substantial portion of taxpayer's losses at issue herein were attributable to the operation of a business regularly carried on by him.

Appellant's Brief Is Defective in Specification of Errors.

Under the caption "Statement of Points To Be Urged", Appellant's Brief, pages 7-10 inclusive, sets out 16 allegations of error. While appellee is thoroughly confident that these allegations must fail on the merits, appellee respectfully submits that the following numbered "Points" of appellant should be ignored in that, as specifications of error, they fail to comply with the requirement of Rule 18(2)(d) of this court that a specification of error in instructions given or refused must contain "the grounds of the objections urged at the trial." The deficient specifications are appellant's "Points" numbered 3, 4, 5, 6, 7, 8, 9, 15 and 16.

"Points" 8 and 9 do not even contain any reference to the record. The other "Points" refer to the record, but it is clear that ". . . citing the transcript of record clearly does not meet the requirement of Rule 18(2)(d) that the grounds of the objections urged at the trial shall be 'set out' in the specification." (*Kobey et al. v. U. S.* (C. A. 9, 1953), 208 F. 2d 583.)

Summary of Argument.

Determination of the tax year in which a loss is sustained is a question of fact.

The entire record in this case is replete with evidence from which argument was properly made by both counsel to the jury, and from which the jury was free to choose its own inferences from the evidence of all the surrounding circumstances of this particular case, and select its verdict of ultimate fact. The jury found for plaintiff on the evidence.

Appellant's objective in this appeal is to convince this court that, upon an oversimplified characterization of the fact pattern of this case, the question of the year of loss must be determined adversely to appellee as a rule of law. By oversimplifying the factual circumstances and seeking a law rule on a fact question, appellant attempts to thwart the very purpose of a jury and a trier of facts, who have first hand observation of all the testimony and evidence, and are the traditional institution to choose among possibly conflicting inferences from the evidence.

The appellate courts must not be used as substitutes for juries.

The United States Supreme Court and the United States Court of Appeals for the Ninth Circuit and other courts have repeatedly held, expressly and impliedly, that determination of the tax year for a loss deduction is a factual determination.

Appellant's argument to the contrary on brief is in large measure based upon appellant's misconstruction of its cited cases. Appellant's argument of those cases has distorted them out of context, and factual determination in those cases have been urged by appellant as rules of law.

Appellant attempts to draw an arbitrary line distinguishing the application of the same exact Code section in different categories of fact situations, viz. (Applicant's Br. p. 11):

> ". . . This is not a case like embezzlement . . . Nor is it a case of a business loss . . ."

The fallacy of such an attempted distinction is demonstrated by the fact that a substantial portion of appellee's loss herein *was a business loss.* [R. 99, 114.] Moreover,

the argument is obviously circular: it attempts to obtain a ruling that this is not a factual question for the jury by a specious distinction based solely on an arbitrary argument, directed without foundation to relative factual merit.

In the present case, there existed a very real occasion for the exercise of judgment of the time when a closed and completed loss would occur. That judgment was the determination whether taxpayer would realize his investment by recovery against the Los Angeles County Flood Control District. The judgment required for that determination may not be measured with more or less exactitude than appraisal of the entire factual evidence of the particular case. This is true of all loss cases, be they stock, contract, tort or business, and is no less true of the instant case.

This learned court must be thoroughly aware that the prospects of a plaintiff's recovery cannot be arbitrarily measured by the name of the field of law in which it occurs.

The jury determined the fact adversely to appellant. Now appellant seeks to argue the factual nature of the case on appeal; viz. (App. Br. pp. 12-13):

> ". . . taxpayer's tort claim was too contingent and speculative to be compensation for the loss . . ."
>
> ". . . The flood occurred, the property was destroyed, and the loss was sustained . . ."
>
> ". . . Here there has been no problem in identifying the event . . ." (which marks the loss).

These arguments are completely circular. Judge Mathes ably and properly instructed the jury in accordance with the law.

ARGUMENT.

I.

Determination of the Tax Year of Loss Is a Fact Question:

The court below properly submitted to the jury for determination as a question of fact the tax year in which plaintiff sustained a closed and completed loss.

Under an agreed form of verdict, the jury found here that Earl Callan did not sustain a closed and completed loss in 1938, the year of the flood. Accordingly, it found that the loss was closed and completed upon termination of the Flood Control District Litigation in 1948.

The evidence presented to the jury included the actual circumstances of the flood, advice of plaintiff's flood attorneys and engineers, their fee arrangements with plaintiff, testimony of the flood evidence presented to such attorneys and engineers, advice of plaintiff's tax counsel, course of the flood litigation including a substantial verdict therein, taxpayer's testimony of his judgment of the merits of his claim, and one of the flood attorneys' testimony of his own informed belief in recovery.

Appellant's counsel argued to the jury that the evidence showed the loss was completed and sustained in 1938. The jury found against those arguments.

The determination of the tax year in which a loss is sustained is a determination of fact.

Alison v. United States (U. S. S. Ct., 1952), 344 U. S. 167;

Boehm v. Commissioner (U. S. S. Ct., 1945), 326 U. S. 287;

Commissioner of Internal Revenue v. Peterman (C. C. A. 9, 1941), 118 F. 2d 973;

Rhodes v. Commissioner (C. C. A. 6), 100 F. 2d 966, 969;

Ashland Iron and Mining Co. v. United States, 56 F. 2d 466 (Ct. Claims, 1932);

Whitney (1949), 13 T. C. 897, at 899 and 901.

And such a determination is obviously of *ultimate* fact. (*Callan et al. v. Westover* (D. Ct., S. D. Calif. 1953), 116 Fed. Supp. 191.) [R. 72.]

Commissioner of Internal Revenue v. Harwick (C. A. 5, 1950), 184 F. 2d 835 (opinion: "At least the Tax Court's finding that the amount of loss was unascertainable until 1944 is not clearly erroneous").

First National Corporation of Portland v. Commissioner of Internal Revenue (C. C. A. 9, 1945), 147 F. 2d 462 (facts: "The year 1934 marked the close of the transaction . . ." Opinion: "If the question were close we would feel constrained to send the case back for a finding").

II.

Scope of Appellate Review of a Jury Action:

Under the Seventh Amendment to the Constitution, a jury trial of fact questions is guaranteed in a civil action.

> "The court does not weigh the evidence but considers whether there is any or sufficient evidence to sustain a verdict . . . The trial judge must, in the exercise of sound discretion, determine whether upon the evidence produced, a verdict can be sustained, not weigh the evidence. If there is evidence, it must be submitted; if not, it is pronouncedly his duty to direct a verdict."

United States v. Lesher (C. C. A. 9, 1932), 59 F. 2d 53.

Thus, upon this appeal, the issue presented to the court is whether appellant can show that the evidence in the record and that referred to by the record is not substantial with reference to the verdict of the jury that the loss was not closed and sustained by plaintiff at the end of the year 1938.

III.

Distinguishing the Scope of Appellate Review in Other Case Authorities:

Because none of the appellate decisions in appellant's brief deal with appeals wherein a jury verdict was involved, the effect of those cases can be properly evaluated as precedent herein only after considering the scope of review therein. Appellee considers that those cases are favorable to appellee under any proper construction. But appellee also submits that the instant case, involving a jury verdict, is subject to review of far narrower scope than cases involving findings of ultimate fact by the Tax Court or a trial judge.

In appeals from the Board of Tax Appeals prior to 1926, the appellate courts were free to and did make factual determinations *de novo*. (*Dobson v. Commissioner* (U. S. S. Ct., 1943), 320 U. S. 489.) By the Revenue Act of 1926, limitations were enacted upon the scope of factual review, but the courts, including the Supreme Court, did not pay "scrupulous deference" to this limitation. (*Dobson, supra,* footnote 8.) It was not until the Dobson decision, in 1943, that the courts became strictly bound to refrain from factual determinations upon review of the Board of Tax Appeals. Then on June 25, 1948, Section 1141(a) of Title 26 of the Internal Revenue

Code was amended to its present form by addition of the following italicized words:

> "The circuit courts of appeals . . . shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, *in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury* . . ."

Thus, in reviews of Tax Court decisions after June 25, 1948, the scope of appellate review of factual determinations is prescribed by Rule 52(a) of the Federal Rules of Civil Procedure, and such determinations under that rule may be set aside if "clearly erroneous", giving "due regard . . . to the opportunity of the trial court to judge of the credibility of the witnesses . . ."

It appears, therefore, that under the test set forth by this court in *Lesher, supra,* a factual determination by a jury will be reviewed only to determine whether there is "any or sufficient evidence to sustain a verdict." On the other hand, in reviews of factual determinations by a trial court prior to *Dobson, supra,* in 1943, the latitude of review was much broader. Even in appeals decided after the amendment of Section 1141(a), Title 26 of the U. S. Code in 1948, by review under the scope of Rule 52(a), F. R. C. P., the review of determinations of ultimate fact by a trial judge will have greater latitude than review involving a jury verdict, although this court will not review even a judge's determination "unless clear error appears." (*Dwight A. Ward v. Commissioner of Internal Revenue* (C. A. 9, 6/22/55), 224 F. 2d 547, footnote 1, and cases cited therein. See also *United States v. Aluminum Co. of America* (C. C. A. 2, 1945), 148 F. 2d 416 at p. 433.)

In determining this appeal, it is important to distinguish the scope of review in other appellate court cases involving the same general fact situation. When the particular rules governing appellate review in each of those cases is examined, it becomes apparent that all of those cases are consistent with the rule that the issue is one of fact, and that the verdict here, reviewable only for the existence of some substantial evidence, should be sustained.

IV.

Analysis of Cases and Arguments of Appellant:

Coming now to the cases and arguments contained in appellant's brief, appellee first submits in all humility that the learned opinion of the court below [R. 55-73] is a more able and thorough exposition of the proper law of this case than any brief we could submit.

Therefore, this brief will be confined to analysis and, we submit, refutation of arguments of appellant's brief.

First, we urge that the holding of *Alison v. U. S.*, 344 U. S. 167 (1952), and the language contained therein, is obviously intended by the Supreme Court as a holding that determination of the year of loss is a factual question in all cases arising under Section 23(e), IRC, which is the same statutory section involved in our instant case. The financial loss in our instant case was the ultimate consequence of damage caused by a flood. The financial loss involved in the *Alison* Supreme Court decision was the ultimate consequence of a theft. The parallel nature of the two situations may be demonstrated by reference to the language of Section 23(e)(3), which indicates that Congress regarded them as parallel situations.

Section 23(e)(3) reads, in pertinent part, as follows:

> ". . . (3) of property not connected with the trade or business, if the loss arises from fires, storms, shipwreck, or other casualty, or from theft."

In the course of its opinion, the Supreme Court said in part as follows:

> ". . . Furthermore, the terms embezzlement and loss are not synonymous. The theft occurs, but whether there is a loss may remain uncertain. One whose funds have been embezzled may pursue the wrongdoer and recover his property wholly or in part. See *Commissioner v. Wilcox*, 327 U. S. 404. Events in the *Alison* case show the practical value of this right of recovery. A substantial proportion of the embezzled funds was recovered in 1941, ten years after the first embezzlement occurred. This recovery alone is ample refutation of the view that a loss is inevitably 'sustained' at the very time an embezzlement is committed."
>
> "Whether and when a deductible loss results from an embezzlement is *a factual question*, a practical one to be decided according to surrounding circumstances. See *Boehm v. Commissioner*, 326 U. S. 287. An inflexible rule is not needed; the statute does not compel it . . ." (Emphasis supplied.)

This language speaks for itself. Citation by the court of *Boehm v. Commissioner* (1945), 326 U. S. 287, a *stock loss* case under Section 23(e), demonstrates that the court regards the *Alison* and *Boehm* cases as controlling *all* determinations of the year of loss under Section 23(e). All such determinations are factual ones. The *Boehm* case proves the fallacy of the restrictions argued by Appellant on brief, pages 17 and 18.

Moreover, the fallacy of such restriction is further shown by the decision of this court in *Douglas County Light and Water Co. v. Commissioner* (C. C. A. 9, 1930), 43 F. 2d 904, wherein this court, deciding the tax year of a loss from an embezzlement discovered in 1916, and settled, after pursuit of the embezzler, in 1922, held the loss year *1922*. Admittedly, this was in the nature of factual review, under the scope of review of the Board then prevailing (see pp. 12-14, *supra*). It demonstrates the absence of any single event as necessarily controlling in determination of the tax year of loss.

Surely a theft is a physical event, no less than a flood, and it cannot be said as a matter of law or fact that recoupment from embezzlers is generally more probable than recoupment from the Los Angeles County Flood Control District. Yet this is what appellant's brief (p. 15) would urge.

In *Cahn v. Commissioner* (C. C. A. 9, 1937), 92 F. 2d 674, reversing 33 B. T. A. 783, this court considered a loss from theft in California in 1924. The insurer, Lloyd's of London, was not licensed to transact business in California, and had no person to accept service of process in this state nor any funds amenable to process in this state. The insurer denied liability, and taxpayer's attorney advised him that suit could not be brought in California, but only in England, which would be prohibitively expensive and probably not result in recovery. In holding that the loss was sustained in the year of theft, 1924, the court said, *inter alia*:

> ". . . in estimating the value of a claim against a foreign insurer suable only abroad, *a business man must rely on the advice of counsel. Here was a claim so uncertain that the insured's attorney advised that*

the prospects of success upon it were not sufficient to justify pursuing it . . ." (Emphasis supplied.)

The court went on to hold that, under these circumstances, the loss was deductible in 1924 even though later the insurer *voluntarily* submitted to suit and partial recovery was obtained.

Counsel believes that this court, in the *Cahn* case, was exercising a scope of factual review in 1937 greater than it would exercise over the jury-determined case now presented. (See above, pp. 12-14.)

But under any scope of review, the crucial importance of "advice of counsel" in evaluating recovery rights is the very essence of the *Cahn* decision.

Surely, a reading of *Cahn* demonstrates appellant's error on brief, pages 13-14:

> ". . . if we assume that taxpayer had claimed his loss in 1938, and the Commissioner had disallowed the deduction, holding that there was no loss so long as a claim for damages existed which the attorneys here involved declared had a reasonable chance of success. We believe it clear that the courts would uphold the taxpayer. *Cahn v. Commissioner,* 92 F. 2d 674 (C. A. 9th)."

On the contrary, *Cahn* is strong authority for the importance attached by the trial court herein to the evidence of the advice of Appellee's flood counsel.

United States v. White Dental Company (1927), 274 U. S. 398, is a decision involving a broader scope of factual review than is present here, especially because of the historical latitude of such review in 1927. (See above, pp. 12-14.) The case resembled *Cahn* in the aspect, which the court emphasized, that the German Government was

not amenable to suit in the year 1918, and in a later year submitted itself to jurisdiction. The court's language demonstrates the existence of a factual determination:

> ". . . we need not attempt to say what constitutes a closed transaction evidencing loss in other situations . . ."

The court's reference to the "destruction or physical injury . . ." of property was pure dictum, purely illustrative by intent, and obviously did not refer to or contemplate a situation where restitution for the physical injury could be expected by the taxpayer. *Alison, supra,* clearly shows the present Supreme Court's opinion on the matter where rights of restitution are involved. Clearly, the Los Angeles Flood Control District was amenable to suit in this case.

Similarly, in *Lewellyn v. Elec. Reduction Co.,* 275 U. S. 243, 247, reference to the "burning of a house" was pure dictum, purely illustrative by intent, and obviously did not refer to or contemplate a situation where restitution for the physical injury could be expected by the taxpayer. Even without restitution rights the dictum is not clear as to the year: ". . . It may well be that he whose house has been burned has sustained a loss whether he knows it or not . . ." Moreover, upon the actual issue presented, the court held that loss from non-delivery of goods paid for in 1918 should be deducted and was sustained in 1922, when the taxpayer's claims for damages become worthless because of defendant's bankruptcy. Surely, non-delivery was a physical event. Moreover, the defendant's liability therein could have been founded upon tort as easily as contract: another example of the fallacy of appellant's argued rule of "law" concerning the tax

effect of the category of appellee's legal rights to recover his damage.

Boehm v. Commissioner (1945), 326 U. S. 287, upon its facts truly involved determination of the tax year of a loss upon the worthlessness of stock, under section 23(e) of the Code. The case is clearly applicable to the year of loss question in all section 23(e) cases. Note *Boehm's* citation as authority in the theft loss case, *Alison, supra.* The tests laid down in *Boehm* are truly applicable in the case at bar. The court's test that *all* pertinent facts and circumstances, "regardless of their objective or subjective nature" are to be considered (pp. 292-293) was clearly followed by Judge Mathes in his instructions to the jury. [R. 161, *et seq.*] And surely counsel for appellant argued the circumstances to the jury. [R. 188-191.]

Appellant's brief (pp. 18-19) is misleading if it purports to state that in *Boehm,* the Supreme Court "did not regard the claim for damages against a third party for destruction of the value of the stock" as material to determination of the loss year. Reading of the last page of the Supreme Court's opinion discloses that the Supreme Court merely held that the Tax Court's "inferences and conclusions on this *factual matter*" was not "so unreasonable from an evidentiary standpoint as to require a reversal of its judgment."

The court, in effect, said: selection of *which* identifiable event establishes the time of loss is a determination of a factual question.

Next, at page 19 of his brief, appellant refers to the rule of annual accounting periods as applicable to losses. Of course, income taxes are computed on annual accounting periods. The question here is a factual one of de-

termining *which* period the loss was completed. Appellant's citation of *Sharp v. Commissioner* (C. A. 6, 1955), 224 F. 2d 920, at this point and at page 14 of his brief, is very interesting. Careful reading of the case will show it is authority for appellee and that appellant has misconstrued the case. In *Sharp,* the *government* argued that a 1945 reduction by the taxpayer in his closing inventory should be disallowed. Gist of the government argument was that (1) a war contract termination claim of taxpayer was in process at the end of 1945, and the inventory reduction represented an indirect effort to take a loss by inventory accounting, and (2) taxpayer's "loss" was not "realized", because the undetermined claim prevented the "loss" being a closed transaction until determination of the claim. (Thus, a position contrary to appellant's position on this appeal.)

The last page of the court's opinion in *Sharp* shows the court agreed with the government's argument in (2) above as a general rule, and held for the taxpayer only because the taxpayer's method of valuing inventory represented "a recognized exception to the necessity of recognizing in income tax returns only closed transactions." Thus, *Sharp,* by its statement of an express exception required by inventory Code sections, proved and expressly reaffirmed the rule applicable to the case here at bar.

Without authority cited, appellant (Br. p. 19) next claims error in the jury instruction that the jury could consider "the success or lack of success" of taxpayer in the prosecution of his claim. Appellee can find no record of this being objected to at the trial. Thus, at this late date, appellant seeks at once to argue that "taxpayer's tort claim was too . . . speculative . . ." (Br. p. 10) and to hide from the jury's consideration the actual

results of that claim. Appellee, on the other hand, was content to give the jury all the evidence and let the jury decide. To the jury, of course, appellant argued strenuously that the results of Appellee's claim were strong evidence against appellee's position herein. [R. 189-190.] Appellant cannot show prejudice. Moreover, appellant's supporting specification of error (No. 8, p. 9 of Br.) fails to set out the grounds urged as error at the trial, and violates this court's Rule 18(2)(d). But, in any event, consideration of "the success or lack of success" is a proper objective circumstance and evidence to be considered as a part of all the surrounding circumstances. *First National Corporation of Portland, supra* ("Substantial recoveries were in fact made on all three of the items . . ."); *Alison, supra,* (". . . A substantial proportion of the embezzled funds was recovered in 1941, ten years after the first embezzlement occurred . . ."). *Douglas County Light and Water Co., supra.*

Next, appellant's brief (p. 19) cites *Commissioner v. Highway Trailer Co.* (C. A. 7, 1934), 72 F. 2d 913. There the court, reversed a well reasoned opinion of the Board of Tax Appeals (28 B. T. A. 792), while admitting "It is difficult . . . to deduce a rule from which to decide this case." Appellee submits that the court was there reviewing a factual determination of the Board of Tax Appeals under the appellate practice then existing (see above pp. 12-14), and that the court might have refused even in 1934 to review a jury determination. In any case, the decision, insofar as it may characterize the matter as a law question, is overruled by *Boehm* and *Alison, supra,* which clearly hold the tax year of

loss a fact question. Even in 1934, the case would be inapplicable in Ninth Circuit.

Peterman, supra;

Douglas County Light and Water Co., supra;

Cahn, supra;

First National Corporation of Portland, supra.

The modern approach to the question is shown in *Commissioner v. Harwick* (C. A. 5, 1950), 184 F. 2d 835, where the court refused to reverse (and thereby affirmed) a Tax Court determination of fact that the loss was not sustained in the earlier tax year of shipwreck, although the insurance claim was then unliquidated and perhaps might later prove to have no value, but that the loss was ascertainable and sustained in the later year in which the claim was settled.

Appellant's brief (pp. 14-15) while distorting the effect of the court's instructions, nevertheless admits that the opinion and instructions of the court below were to the effect that the jury should find whether the loss was sustained in the tax year 1938. But his brief there cites numerous cases involving the taxability of income to a taxpayer (Sec. 22 of the Internal Revenue Code) as authority upon the meaning of section 23(e) of the Internal Revenue Code. The cases cited by appellant are not in point because they concern a different statutory section and a different question. The cases cited throughout this brief make it clear that the words of section 23(e), "losses sustained during the taxable year and not compensated for by insurance or otherwise", are construed together as a whole, not separately, and that the courts consider the problem to determine in a given case whether the loss in question is evidenced by a

"closed and completed transaction." [Mathes, J., R. pp. 62-63, 67-68.] Surely in *Alison, supra,* and in *Douglas County Light and Water Co., supra,* neither the Supreme Court nor this court, respectively, were deciding, as two separate issues, under section 23(e), whether there was, first, a loss deductible in the theft year and, secondly, compensation which was taxable income. It is obvious, from a reading of those decisions, that the respective courts considered the question as a whole, *i. e.,* whether there was a closed and realized loss of the taxpayer's investment—that is, *which* of the ascertainable events marked the practical closing of the loss. And *Alison,* which is not only controlling but probably the most recent direct appellate decision in the entire field, expressly held this a single question of fact. See also *Commissioner v. Harwick, supra.*

It is clear from the jury instructions [R. 163] and the [R. 168] agreed form of verdict [R. 114] that the issue was submitted to the jury as determination of the year in which the loss was finally sustained.

V.

No Error in Jury Instructions.

We come now to the claim by Appellant's Brief, page 20, of error in the court's refusal to give requested instruction No. 5. This refusal, says appellant, caused the instructions given to erroneously allow "controlling weight to taxpayer's state of mind."

This claim deals with appellant's specification of error No. 15 (p. 10 of Br.).

First, appellee believes that this argument should be ignored because appellant's said specification of error has

failed to comply with Rule 18(2)(d) of the rules of this court. See this Brief above, pages 12-14. Moreover, the said specification's citation to the record [R. 103] shows, upon reference, that the "grounds" cited at R. 103 were simply the regulation itself, and the trial court's own memorandum of decision. Yet the requested instruction did not even embody the whole portion of the regulation quoted by the trial court [R. 60] as relevant. The objections of appellant at the trial were "cryptic". (*Kobey, supra.*)

Second, if this court nevertheless considers this specification No. 15, appellee submits that here, the material issues in the case were comprehensively and correctly covered in the instructions given. [See explanatory opinion of Mathes, J., R. 60-72.] The entire instructions of the trial court on this issue [R. 160-163] are directed to an explanation in plain English of tests laid down by the courts for determining the fact of the tax year in which the loss became closed. Appellant's Requested Instruction No. 5 was properly refused because "the court is not required to give a requested instruction in terms to suit the desire of the party tendering it, even though it be a correct statement of law." (*Profaci v. Mamiapro Realty Corp.* (C. A. 10, 1954), 216 F. 2d 885.)

The instructions must be considered as a whole. (*Barcott v. U. S.* (C. A. 9, 1948), 169 F. 2d 929, 932, cert. den., 1949, 336 U. S. 912, 913.)

Third, a reading of the whole record shows that the judgment in this case would not have been different had the refused instruction been given. (*Kottcakos v. United States,* 328 U. S. 750.)

Fourth, under the instructions the jury was to "consider all the surrounding circumstances as shown by the evidence", including such objective facts as the date of the physical loss, disclosures to his flood attorneys, success or lack of success in prosecuting the flood case, the objective reasonableness of his pursuit of recoupment and therefore the merit, reasonably ascertainable to taxpayer of his flood case. [R. 161-163.] Any ordinary person understands that the reasonableness and "ordinary business care and prudence" of conduct is measured by the ascertainable circumstances; and does not mean a merely subjective belief, but includes all circumstances, subjective and objective. Appellee submits that Judge Mathes' opinion [R. 64-71, incl.], amply and precisely sets forth the reasoning and judicial authorities with which the jury instructions properly conform.

Conclusion.

Determination of the tax year of loss is a factual question. That question was here properly submitted to the jury and determined by the jury. The judgment of the court below should be affirmed.

Respectfully submitted,

HERBERT S. MILLER,

Attorney for Appellees.

No. 14822

United States
Court of Appeals
for the Ninth Circuit

BLUMENFELD ENTERPRISES, INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court
of the United States

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. —12-14-55

No. 14822

United States
Court of Appeals
for the Ninth Circuit

BLUMENFELD ENTERPRISES, INC.,
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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

The Tax Court of the United States

Docket No. 39132

BLUMENFELD ENTERPRISES, Inc.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

APPEARANCES

For Petitioner:
Samuel Taylor, Esq.,
Walter G. Schwartz, Esq.,
Robert O. Folkoff, C.P.A.

For Respondent:
Leonard A. Marcussen, Esq.

DOCKET ENTRIES

1952

Feb. 25—Petition received and filed. Taxpayer notified. Fee paid.

Feb. 27—Copy of petition served on General Counsel.

Feb. 25—Request for hearing at San Francisco, Calif., filed by taxpayer. 3/5/52 Granted.

Mar. 26—Answer filed by General Counsel.

Mar. 27—Copy of answer served on taxpayer. San Francisco.

1953

Jan. 30—Hearing set Mar. 23, 1953, San Francisco.

Mar. 2—Motion for a continuance to the next San Francisco calendar filed by taxpayer.

1953

Mar. 3—Hearing set Mar. 11, 1953 at Washington, D. C., on petitioner's motion.

Mar. 3—Copy of motion and notice of hearing served on General Counsel.

Mar. 9—Motion for a continuance from Mar. 23, 1953, San Francisco calendar, to the next San Francisco calendar filed by taxpayer. Granted.

Mar. 9—Order, that petitioner's motion is granted, proceeding is stricken from the Mar. 23, 1953 San Francisco calendar and continued to the next San Francisco calendar, further order, that proceeding is stricken from the Mar. 11, 1953, Washington, D. C. calendar, entered.

July 31—Hearing set Nov. 2, 1953, San Francisco.

Sep. 29—Motion for a continuance from Nov. 2, 1953, San Francisco calendar to the next San Francisco calendar filed by taxpayer. 9/30/53 Granted.

Dec. 22—Hearing set Mar. 15, 1954, San Francisco.

1954

Mar. 16—Hearing had before Judge Raum on the merits; on petitioner's oral motion to file amended petition. Granted. Respondent given 15 days to file answer. Amended petition (copies served) and stipulation of facts with exhibits 1-A through 5-E filed at hearing. Briefs due 5/3/54; replies due 6/2/54.

1954

Mar. 25—Answer to amended petition filed by General Counsel. 3/26/54 copy served.

Apr. 5—Transcript of hearing 3/16/54 filed.

Apr. 26—Motion for extension to May 17, 1954 to file brief filed by petitioner. 4/27/54 Granted.

May 12—Stipulation as to corrections of transcript, filed.

May 17—Brief filed by taxpayer. Brief filed by General Counsel. 5/18/54 copy served.

Jun. 17—Motion for extension to June 23, 1954, to file reply briefs filed by petitioner. 6/17/-54 Granted.

Jun. 18—Reply brief filed by taxpayer. 6/21/54 copy served.

Jun. 29—Motion for leave to file reply brief, reply brief lodged, filed by General Counsel. 6/30/54 Granted.

Sept. 9—Motion for leave to file supplementary brief, supplementary brief lodged, filed by taxpayer. 9/10/54 Granted. 9/10/54 copy served.

1955

Jan. 20—Findings of fact and opinion filed. Raum, J. Decision will be entered under Rule 50. Copy served 1/20/55.

Mar. 11—Agreed computation for entry of decision filed.

Mar. 23—Decision entered, Judge Raum, Div. 11.

Jun. 15—Petition for review by U. S. Court of Appeals, Ninth Circuit, filed by taxpayer.

Jun. 15—Designation of contents of record on review, filed by taxpayer.

[Title of Tax Court and Cause.]

AMENDED PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency dated December 12, 1951 and bearing symbols IRA:90-D:HM, and as a basis for its proceeding alleges as follows:

1. Petitioner is a corporation organized and existing under the laws of the State of California with its principal office at San Francisco, California. Petitioner duly filed its corporation income tax returns for the taxable years ended July 31, 1948, 1949 and 1950 with the Collector of Internal Revenue for the First District of California.

2. The notice of deficiency (a copy of which is attached to the original Petition filed in this proceeding as Exhibit A thereto and is incorporated by reference in this Amended Petition as Exhibit A hereof) was mailed to petitioner by registered mail on December 12, 1951.

3. The tax in controversy is income tax in the amount of an alleged deficiency of $31,710.06 and in the amount of a refund claimed by the petitioner of $30,803.55. Both deficiency and refund pertain to the taxable year ended July 31, 1948. The total amount of deficiency and refund in controversy is $62,513.61, and all of said amount is in controversy.

4. The determination of tax and the failure to

allow the claim for refund are based upon the following errors:

(1) The Commissioner erred in disallowing a loss incurred by the petitioner upon its abandonment and the demolition of the Tivoli Theatre Building during the taxable year of the petitioner ended July 31, 1950.

(2) In the alternative to the allegation of error contained in paragraph 4(1) of this Amended Petition, the Commissioner erred in disallowing a loss incurred by the petitioner upon the sale of the Tivoli Theatre Building during the taxable year of the petitioner ended July 31, 1950.

(3) The Commissioner erred in reducing the cost basis for depreciation of the Tivoli Theatre Building, the Tivoli Office Building, and the equipment of said buildings from the amounts reported by the petitioner on its returns and consequently further erred in correspondingly reducing the deduction for depreciation of said property taken by the petitioner during its fiscal years ended July 31, 1948, 1949 and 1950.

(4) The Commissioner erred in disallowing the carry-back to the fiscal year ended July 31, 1948 of a net operating loss sustained by the petitioner in the fiscal year ended July 31, 1950.

5. The facts upon which petitioner relies as a basis for this proceeding are as follows:

(1) Shortly before May 1, 1950, the petitioner abandoned the Tivoli Theatre Building theretofore used by it in its trade or business and granted to

the lessee of said building the authority to demolish said building. The lessee thereupon caused the demolition of the building commencing on or about May 1, 1950. The cost of the theatre building to the petitioner at the time of its abandonment and demolition was $193,275.42, against which there was a reserve for depreciation of $39,049.08. The depreciated cost of the theatre building to the petitioner at the time of its bandonment and demolition was $154,226.34. The petitioner incurred a loss in this amount in its fiscal year ended July 31, 1950 as a result of the abandonment and demolition of the theatre building. In the alternative, this transaction comprised a sale by the petitioner to its lessee of the Tivoli Theatre Building at a loss to petitioner of $154,226.34. Said building was used in petitioner's trade or business and had been held for more than six months. Said loss constituted a loss deductible in full under the provisions of Section 117(j) of the Internal Revenue Code.

(2) Allocation of the original purchase price paid by the petitioner for the Tivoli property was made by the petitioner and by the Commissioner as follows:

	Petitioner's Allocation	Commissioner's Allocation
Land	$ 92,448.19	$136,192.27
Theatre building	154,391.15	131,178.55
Office building	85,289.35	65,769.72
Equipment	10,272.03	9,260.18
Total	$342,400.72	$342,400.72

The petitioner and the Commissioner are in agreement as to the rates of depreciation and as to the allocation of the improvements to said property. The petitioner in its income tax returns for its fiscal years ended July 31, 1948, 1949 and 1950 has computed its depreciation on the basis of its own allocation shown above; whereas, the Commissioner has reduced said depreciation allowances and has computed such allowances on the basis of the allocation made by the Commissioner, as shown above. The depreciation claimed by petitioner in its income tax returns for its fiscal years ended July 31, 1948, 1949 and 1950 is correctly stated, and the Commissioner erred in reducing said depreciation.

(3) As a consequence of its loss upon the Tivoli Theatre Building during its fiscal year ended July 31, 1950 and of its other operations during said year, the petitioner incurred a net operating loss for said taxable year in the amount of $82,818.32. Petitioner duly claimed said loss by way of a net operating loss carry-back to its fiscal year ended July 31, 1948. Said loss was properly allowable by way of a net operating loss carry-back to said year. As a result of said net operating loss carry-back to said year, the petitioner was entitled to a refund of $30,803.55 in income tax for said year. An application for tentative carry-back adjustment and a claim for refund were duly filed claiming said refund of $30,803.55 for said year. As a result of the disallowance of the net operating loss carry-back to the taxable year ended July 31, 1948 and as a result of the adjustments to depreciation referred to in Para-

graph 5(2) of this Amended Petition, the Commissioner has erroneously determined a deficiency in tax for said year.

Wherefore, petitioner prays that this Court may hear this proceeding and determine that there is no deficiency in income tax due from this petitioner for its taxable year ended July 31, 1948, that there is a refund in income tax due to petitioner in the amount of $30,803.55 or in such amount as this Court may determine and that it may grant such further relief as may to it seem proper.

Dated: San Francisco, California, March 15, 1954.

Respectfully submitted,

/s/ SAMUEL TAYLOR,
/s/ WALTER G. SCHWARTZ,
/s/ ROBERT O. FOLKOFF by S.T.,
Counsel for Petitioner

Duly Verified.

EXHIBIT A

Treasury Department, Internal Revenue Service, 74 New Montgomery St., San Francisco 5, California.

San Francisco Division IRA:90-D:HM

Blumenfeld Enterprises, Inc. Dec. 12, 1951
70 Eddy St., San Francisco, California

Gentlemen:

You are advised that the determination of your income tax liability for the taxable year ended July

31, 1948 discloses a deficiency of $31,710.06 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, San Francisco 5, California, for the attention of Conference Section. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

JOHN B. DUNLAP,
Commissioner,
/s/ By F. M. HARLESS,
Internal Revenue Agent in Charge

Enclosures: Statement, Form 1276, Form 870, Exhibit A.

STATEMENT

Tax Liability for the Taxable Year Ended July 31, 1948.

	Liability	Assessed	Deficiency
Income tax	$65,026.30	$33,316.24	$31,710.06

This determination of your income tax liability has been made on the basis of information on file in this office. Careful consideration has been given your claim for refund filed December 11, 1950.

If a petition to The Tax Court of the United States is filed against the deficiency proposed herein, the issue set forth in your claim for refund should be made a part of the petition to be considered by the Board in any redetermination of your tax liability. If a petition is not filed, the claim for refund will be disallowed and official notice will be issued by registered mail in accordance with section 3772 of the Internal Revenue Code.

Due to the adjustments to your net income for the year ended December 31, 1950, the net operating loss claimed for that year has been eliminated.

ADJUSTMENTS TO NET INCOME
Year Ended: July 31, 1948

Net income as disclosed by return	$133,808.73
Unallowable deductions and additional income:	
(a) Depreciation	39,013.77
Total	$172,822.50
Nontaxable income and additional deductions:	
(b) Franchise tax	1,700.65
Net income as adjusted	$171,121.85

EXPLANATION OF ADJUSTMENTS

(a) Deduction for depreciation is decreased by $39,013.77, as shown in Exhibit A attached.

(b) Franchise tax deduction is increased by $1,700.65 as follows:

Increase in income for year ended July 31, 1947 as adjusted	$ 49,321.77
Add: Franchise tax adjustment for year ended July 31, 1947	697.40
Increase in income subject to franchise tax	$ 50,019.17
Increase in franchise tax deduction (3.4% of $50,019.17)	$ 1,700.65

COMPUTATION OF INCOME TAX
Year Ended: July 31, 1948

Net income		$171,121.85
Normal tax net income		$171,121.85
Surtax net income		$171,121.85
Total normal tax on $171,121.85 at 24%		$ 41,069.27
Total surtax on $171,121.85 at 14%		23,957.06
Correct income tax liability		$ 65,026.30
Income tax assessed:		
Original Account No. 410095, January 1949 List, First California District	$ 50,847.32	
Additional, Account No. 528302, August 31, 1950 List	13,272.47	
	$ 64,119.79	
Less: Tentative allowance under section 3780	30,803.55	33,316.24
Deficiency of income tax		$ 31,710.06

DEPRECIATION SCHEDULE

	Date Acquired	Cost		Depreciation Allowable 1948
Esquire Theatre—				
Stockton				
Improvements	11-25-46	$235,175.93	4%	$ 9,407.03
Improvements	12-16-47	4,351.09	4%	108.75
Esquire Theatre—				
Sacramento				
Leasehold	8- 1-45	230,000.00	6⅔%	15,333.33
Tower Theatre leasehold	5- 1-45	140,000.00	6⅔%	9,333.33
Times Theatre leasehold	8- 1-45	140,000.00	6⅔%	9,333.33
Roxie Theatre leasehold	8- 1-45	350,000.00	6⅔%	23,333.33
Stockton Motor Movies				
Paving	5-14-48	68,492.00 (2½ mo.)	10%	1,426.92
Buildings	5-14-48	73,930.28 (2½ mo.)	6⅔%	1,026.81
Fence	5-14-48	7,500.00 (2½ mo.)	10%	156.25
Speakers	5-14-48	14,184.57 (2½ mo.)	25%	738.78
Tivoli Theatre				
Repairs capitalized	8- 1-47	12,018.84	5%	600.94
Appraisal fee capitalized	8- 1-45	5,000.00	8⅓%	416.00*
Building	8- 1-47	141,047.94	224 mo.	7,556.14
Office building	8- 1-47	94,325.05	224 mo.	5,053.13
Equipment	8- 1-47	7,891.58	104 mo.	910.57
Depreciation allowable				$ 84,734.64
Depreciation claimed				123,748.41
Decrease				$ 39,013.77

* [In longhand]: This is not part of the Tivoli Bldg.

[Endorsed]: T.C.U.S. Filed March 16, 1954.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated by and between counsel for the petitioner and counsel for the respondent in the above-entitled case that the following facts may be taken as true in said case:

1. Petitioner is a corporation organized and existing under the laws of the State of California with its principal office at San Francisco, California. Petitioner filed its corporation income tax returns for its fiscal years ended July 31, 1948, 1949 and 1950 with the Collector of Internal Revenue for the First District of California. Petitioner keeps its books and files its returns on the accrual basis.

2. Respondent on or about June 27, 1952 mailed to petitioner by registered mail the notice of deficiency covering its fiscal years ended July 31, 1949 and 1950. A copy of said notice is attached hereto as Exhibit 1-A. Petitioner did not file a petition with The Tax Court of the United States for a redetermination of the deficiencies set forth in said notice. Petitioner paid said deficiencies and filed claims for the refund thereof.

3. This proceeding involves a piece of real property located in downtown San Francisco, California known as the Tivoli property. Prior to the close of petitioner's fiscal year ended July 31, 1950, two separate buildings were located on the Tivoli property, one known as the Tivoli Theatre Building and the other known as the Tivoli Office Building. The build-

ings were separate and distinct buildings. Their relative location is shown on the map attached hereto as Exhibit 2-B. The Tivoli Theatre Building was a Class A reinforced concrete building; the Tivoli Office Building is a Class B brick building.

4. Petitioner acquired a leasehold in the Tivoli property in July 1945 and on or about March 10, 1946 petitioner purchased the fee interest in the Tivoli property.

5. On October 6, 1949, petitioner as lessor and Harry Morofsky as lessee executed a lease of the Theatre Building, and Herman Hertz executed a limited guaranty of the lessee's obligations under said lease. A copy of said lease and guaranty is attached hereto as Exhibit 3-C. Exhibit A to said lease is omitted; said Exhibit A comprised a sketch substantially the same as Exhibit 2-B to this Stipulation of Facts.

6. Neither Harry Morofsky nor Herman Hertz is a shareholder or officer of petitioner, and neither is related to any of the shareholders or officers of petitioner.

7. After the execution of the lease agreement of October 6, 1949, Harry Morofsky, the lessee, submitted to the proper authorities of the City and County of San Francisco his plans for remodeling the Tivoli Theatre Building so as to convert said building to a five story parking garage, said plans having previously been approved by petitioner. The City and County authorities declined to approve said plans as submitted and insisted upon costly

revisions involving a substantial increase in the thickness of the walls by the addition of concrete, the inclusion of additional supporting members, and changes in the plans for the ramps, all of such a nature as to reduce substantially the amount and convenient useability of floor space for parking purposes and to render it economically unfeasible to use the Theatre Building for the purpose of a parking garage.

8. On April 24, 1950, petitioner and Harry Morofsky signed the letter agreement attached hereto as Exhibit 4-D. Pursuant thereto the Tivoli Theatre Building was demolished.

9. On February 23, 1951, petitioner and Harry Morofsky executed the agreement attached hereto as Exhibit 5-E. On September 27, 1951, Harry Morofsky exercised the option granted by the agreements of April 24, 1950 and February 23, 1951 to purchase the Tivoli property, and on November 7, 1951 Harry Morofsky assigned his rights thereunder to the Hertz Shoe Clinic, Inc., a corporation. Said corporation is now the owner of the Tivoli property.

10. In its income tax return for its fiscal year ended July 31, 1950, petitioner claimed as a deduction an abandonment loss on the demolition of the Tivoli Theatre Building in the amount of $154,-226.34, representing the undepreciated balance of the cost of that Building, as shown on petitioner's books, resulting in a net operating loss of $82,-818.32 for its fiscal year ended July 31, 1950. Petitioner claimed a net operating loss carry-back of

$82,818.32 from its fiscal year ended July 31, 1950 to its fiscal year ended July 31, 1948 and made an application for a tentative carry-back adjustment under section 3780 of the Internal Revenue Code. A tentative allowance was made to petitioner under said section in the amount of $30,803.55.

11. In his determination of petitioner's deficiency for the fiscal year ended July 31, 1950 (see Exhibit 1-A hereto), respondent has disallowed the deduction of $154,226.34 claimed upon the demolition of the Tivoli Theatre Building, and in his notice of deficiency to petitioner for its fiscal year ended July 31, 1948 (Exhibit A to the petition), respondent has not allowed the net operating loss deduction claimed by petitioner.

12. Petitioner's adjusted basis for the Tivoli property as of August 1, 1947, is as shown below, rather than the amounts shown in the notice of deficiency for petitioner's fiscal year ended July 31, 1948 and in the notice of deficiency for petitioner's fiscal years ended July 31, 1949 and 1950 (Exhibit 1-A hereto):

	Adjusted Basis—August 1, 1947	
	Per Notices of Deficiency	As Stipulated
Theatre building	$141,047.94	$148,785.47
Office building	94,325.05	100,831.59
Equipment	7,891.58	8,228.87
Land	136,192.27	121,610.91

13. The depreciation allowable to petitioner with respect to the Tivoli property for the fiscal years ended July 31, 1948, 1949 and 1950 is as follows,

rather than the amounts allowed by the said notices of deficiency:

	Allowable Depreciation	
	Per Notices of Deficiency	As Stipulated
Theatre building:		
F.y.e. 7/31/48 and '49	$7,556.14	$7,970.65
F.y.e. 7/31/50	1,889.04	1,992.66
Office building (all years)	5,053.13	5,401.69
Equipment:		
F.y.e. 7/31/48	910.57	949.48
F.y.e. 7/31/49	949.96	949.48
F.y.e. 7/31/50	227.64	237.37

14. In the event that this Court should determine that petitioner is entitled to a deduction by reason of the demolition, abandonment or sale of the Tivoli Theatre Building, the amount allowable is $132,-284.42, computed as follows:

(a)	Theatre Building	$148,785.47	
	Less depreciation allowed or allowable		
	F.y.e. July 31, 1948 $7,970.65		
	F.y.e. July 31, 1949 7,970.65		
	F.y.e. July 31, 1950 1,992.66		
		17,933.96	
	Unrecovered cost		$130,851.51
(b)	Improvements	1,598.42	
	Less depreciation allowed or allowable to November 1, 1949	165.51	
	Unrecovered cost		1,432.91
			$132,284.42

15. Petitioner has claimed in its returns, and respondent has allowed, depreciation on the Tivoli

Theatre and Office Buildings on the basis of a remaining life of twenty (20) years from the date of its acquisition of the fee interest therein (March 10, 1946).

Dated: San Francisco, California, March 16, 1954.

Respectfully submitted,

/s/ SAMUEL TAYLOR,

/s/ WALTER G. SCHWARTZ,

/s/ ROBERT O. FOLKOFF,
Counsel for Petitioner

/s/ DANIEL A. TAYLOR,
Counsel for Respondent

EXHIBIT 1-A

U. S. Treasury Department, Office of Internal Revenue Agent in Charge, 74 New Montgomery St., San Francisco 5, California.

San Francisco Division, IRA:90-D:CRA

Blumenfeld Enterprises, Inc. Jun 27, 1952
70 Eddy St., San Francisco, California

Gentlemen:

You are advised that the determination of your income tax liability for the taxable year(s) ended July 31, 1949 and July 31, 1950 discloses a deficiency of $27,169.76 as shown in the statement attached.

In accordance with the provisions of existing

internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia, in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to this office for the attention of IRA:90-D. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours,

JOHN B. DUNLAP,
Commissioner,

/s/ By F. M. HARLESS,
Internal Revenue Agent in Charge

Enclosures: Statement, Form 1276, Agreement Form, Exhibits A, A-1 and A-2.

STATEMENT

Tax Liability for the Taxable Years Ended July 31, 1949 and July 31, 1950:

Fiscal Year Ended	Liability	Assessed	Deficiency
July 31, 1949	$58,719.51	$57,858.70	$ 860.81
July 31, 1950	26,308.95	0.00	26,308.95
Total			$27,169.76

In making this determination of your income tax liability, careful consideration has been given to your protest filed February 25, 1952, and to the statements made at the conference held on March 25, 1952.

A copy of this letter and statement has been mailed to your representative Mr. Samuel Taylor, 1211 Balfour Building, San Francisco, California, in accordance with the authority contained in the power of attorney executed by you and on file in this office.

ADJUSTMENTS TO NET INCOME
Fiscal Year Ended July 31, 1949

Net income as disclosed by return	$152,444.15
Unallowable deductions and additional income:	
(a) Depreciation	13,196.40
Total	$165,640.55
Nontaxable income and additional deductions:	
(b) Franchise tax	1,326.47
Net income as adjusted	$164,314.08

EXPLANATION OF ADJUSTMENTS

(a) For computation of depreciation adjustment see Exhibits A, A-1 and A-2 hereto attached.

(b) Additional franchise tax deduction is computed as follows:

Additional income for the fiscal year ended July 31, 1948 as previously determined for that year ($36,628.21 plus $2,385.56)	$ 39,013.77
Franchise tax at 3.4% x $39,013.77=	$ 1,326.47

The above additional franchise tax was accruable on August 1, 1948 the first day of the fiscal year ended July 31, 1949.

COMPUTATION OF ALTERNATIVE INCOME TAX
Fiscal Year Ended July 31, 1949

Normal-tax net income	$164,314.08
Excess of long-term capital gain over short-term capital loss	28,614.15
Adjusted normal-tax net income	$135,699.93
Surtax net income	$164,314.08
Less: Excess of net long-term gain over net short-term loss	28,614.15
Adjusted surtax net income	$135,699.93
Normal tax at 24%	$ 32,567.98
Surtax at 14%	18,997.99
Total normal tax and surtax	$ 51,565.97
Add: 25% of excess of net long-term capital gain over net short-term capital loss	7,153.54
Alternative tax	$ 58,719.51

COMPUTATION OF INCOME TAX
Fiscal Year Ended July 31, 1949

Net income		$164,314.08
Adjusted net income		$164,314.08
Normal-tax net income		$164,314.08
Surtax net income		$164,314.08
Normal Tax Computation		
Normal-tax net income	$164,314.08	
Tax at 24%		$ 39,435.37

STATEMENT

Tax Liability for the Taxable Years Ended July 31, 1949 and July 31, 1950:

Fiscal Year Ended	Liability	Assessed	Deficiency
July 31, 1949	$58,719.51	$57,858.70	$ 860.81
July 31, 1950	26,308.95	0.00	26,308.95
Total			$27,169.76

In making this determination of your income tax liability, careful consideration has been given to your protest filed February 25, 1952, and to the statements made at the conference held on March 25, 1952.

A copy of this letter and statement has been mailed to your representative Mr. Samuel Taylor, 1211 Balfour Building, San Francisco, California, in accordance with the authority contained in the power of attorney executed by you and on file in this office.

ADJUSTMENTS TO NET INCOME
Fiscal Year Ended July 31, 1949

Net income as disclosed by return	$152,444.15
Unallowable deductions and additional income:	
(a) Depreciation	13,196.40
Total	$165,640.55
Nontaxable income and additional deductions:	
(b) Franchise tax	1,326.47
Net income as adjusted	$164,314.08

EXPLANATION OF ADJUSTMENTS

(a) For computation of depreciation adjustment see Exhibits A, A-1 and A-2 hereto attached.

(b) Additional franchise tax deduction is computed as follows:

Additional income for the fiscal year ended July 31, 1948 as previously determined for that year ($36,628.21 plus $2,385.56)	$ 39,013.77
Franchise tax at 3.4% x $39,013.77=	$ 1,326.47

The above additional franchise tax was accruable on August 1, 1948 the first day of the fiscal year ended July 31, 1949.

COMPUTATION OF ALTERNATIVE INCOME TAX
Fiscal Year Ended July 31, 1949

Normal-tax net income		$164,314.08
Excess of long-term capital gain over short-term capital loss		28,614.15
Adjusted normal-tax net income		$135,699.93
Surtax net income		$164,314.08
Less: Excess of net long-term gain over net short-term loss		28,614.15
Adjusted surtax net income		$135,699.93
Normal tax at 24%		$ 32,567.98
Surtax at 14%		18,997.99
Total normal tax and surtax		$ 51,565.97
Add: 25% of excess of net long-term capital gain over net short-term capital loss		7,153.54
Alternative tax		$ 58,719.51

COMPUTATION OF INCOME TAX
Fiscal Year Ended July 31, 1949

Net income		$164,314.08
Adjusted net income		$164,314.08
Normal-tax net income		$164,314.08
Surtax net income		$164,314.08
Normal Tax Computation		
Normal-tax net income	$164,314.08	
Tax at 24%		$ 39,435.37

Surtax Computation		
Net income from above	$164,314.08	
Surtax net income	$164,314.08	
Tax at 14%		23,003.97
Total normal tax and surtax		$ 62,439.34
Alternative tax		$ 58,719.51
Correct income tax liability		$ 58,719.51
Income tax assessed:		
Original, No. 410003		
First California District	$ 54,208.94	
Additional assessed—Account No. 528303—List Aug. 1950	3,649.76	57,858.70
Deficiency of income tax		$ 860.81

ADJUSTMENTS TO NET INCOME
Fiscal Year Ended July 31, 1950

Net income as disclosed by return		($ 82,818.32)
Unallowable deductions and additional income:		
(a) Depreciation	$ 1,804.84	
(b) Abandonment loss	154,226.34	
(c) Additional capital gain	749.15	156,780.33
Total		$ 73,962.01
Nontaxable income and additional deductions:		
(d) Franchise tax	$ 79.76	
(e) Contributions	3,693.40	3,773.16
Net income as adjusted		$ 70,188.85

EXPLANATION OF ADJUSTMENTS

(a) For computation of depreciation adjustment see attached Exhibit A.

(b) In your return you claimed as an abandonment loss the sum of $154,226.34 as representing the undepreciated balance of cost of the theatre portion of the Tivoli Building which was demolished during the year. The demolition was accomplished by the lessee of the building under the terms of a modification dated April 24, 1950 of a lease dated October 9, 1949 which gave the lessee the

right to change the theatre into a multi-story garage for rentals to total $420,000.00 plus real estate taxes over a 25-year period.

The unrecovered cost of the building voluntarily demolished in connection with securing the lease is held to be a capital cost of the lease amortizable over the life of the lease. The claimed abandonment loss is therefore disallowed.

(c) Additional capital gain is computed as follows:

Decrease in basis of Tivoli Theatre equipment:		
Book value	$ 10,272.03	
As revised in Exhibit A-1 attached	9,260.18	$ 1,011.85
Less: Decrease in accumulated depreciation:		
Per books—$10,272.03x10%x42/12	$ 3,680.81	
Allowable to July 31, 1947....$1,369.60		
Allowable 8/1/47 to 7/31/49 1,820.90		
Allowable 8/1/49 to 10/31/49 227.61	3,418.11	262.70
Net adjustment		$ 749.15

(d) Additional franchise tax is computed as follows:

Net income fiscal year ended 7/31/49 as computed herein	$164,314.08
Franchise tax deducted in return for fiscal year ended July 31, 1949	4,538.59
Additional franchise tax allowed in fiscal year ended July 31, 1949 as computed herein	1,326.47
Net capital loss carry-over to fiscal year ended July 31, 1949	12,342.75
Total subject to franchise tax	$182,521.89
Franchise tax 3.4%x$182,521.89	$ 6,205.74
Franchise tax claimed in return	6,125.98
Additional franchise tax	$ 79.76

(e) Contributions were not claimed due to the fact that your return as filed showed no net income. The above adjustments produce net income in the sum of $73,868.16 before contributions. Actual contributions totalled $12,072.54. A deduction is therefore allowed to the extent of 5% of such revised net income before contributions in accordance with the provisions of Section 23(q) of the Internal Revenue Code.

5% x $73,868.16 = $3,693.40

COMPUTATION OF ALTERNATIVE INCOME TAX
Fiscal Year Ended July 31, 1950

Computation at rates applicable before July 1, 1950	
Normal-tax net income	$ 70,188.85
Excess of long-term capital gain over short-term capital loss	2,614.56
Adjusted normal-tax net income	$ 67,574.29
Surtax net income	$ 70,188.85
Less: Excess of net long-term gain over net short-term loss	2,614.56
Adjusted surtax net income	$ 67,574.29
Normal tax at 24%	$ 16,217.83
Surtax at 14%	9,460.40
Total normal tax and surtax	$ 25,678.23
Add: 25% of excess of net long-term capital gain over net short-term capital loss	653.64
Alternative tax	$ 26,331.87
Computation at rates applicable after July 1, 1950	
Ordinary net income	$ 67,574.29
Dividends received credit	0.00
Surtax net income	$ 67,574.29
Combined normal and surtax at 45%	$ 30,408.43
Adjustments	0.00
Partial tax	$ 30,408.43
25% of excess of long-term capital gain over short-term capital loss	653.64
Alternative tax	$ 31,062.07
Less: $5,000.00 (20% of $25,000.00 not subject to surtax)	5,000.00
Amount subject to proration below	$ 26,062.07

Proration of taxes computed above:		
Alternative tax at rates applicable before July 1, 1950	$ 26,331.87	
Portion of alternative tax 334/365x$26,331.81		$ 24,095.46
Alternative tax at rates applicable after July 1, 1950	$ 26,062.07	
Portion of alternative tax 31/365x$26,062.07		2,213.49
Total alternative tax		$ 26,308.95

COMPUTATION OF INCOME TAX
Fiscal Year Ended July 31, 1950

Computation at rates applicable before July 1, 1950	
Net income	$ 70,188.85
Less: Interest on certain obligations of the United States and its instrumentalities	0.00
Adjusted net income	$ 70,188.85
Less: Dividends received credit	0.00
Normal tax net income	$ 70,188.85
Surtax net income	$ 70,188.85
Normal tax at 24%	$ 16,845.32
Surtax at 14%	9,826.44
Total normal tax and surtax	$ 26,671.76
Computation at rates applicable after July 1, 1950	
Normal tax net income as shown above	$ 70,188.85
Surtax net income as shown above	$ 70,188.85
Combined normal tax and surtax at 45%	$ 31,584.98
Less: $5,000.00 (20%x$25,000.00 not subject to surtax)	5,000.00
Amount subject to proration below	$ 26,584.98
Proration of taxes computed above	
Normal tax and surtax at rates applicable before July 1, 1950	$ 26,671.76

Portion of normal tax and surtax 334/365x$26,671.76		$ 24,406.49
Normal tax and surtax at rates applicable after July 1, 1950	$ 26,584.98	
Portion of normal tax and surtax 31/365x$26,584.98		2,257.90
Total		$ 26,664.39
Alternative tax		$ 26,308.95
Correct income tax liability		$ 26,308.95
Income tax assessed—Account No. 9205311—First California District		0.00
Deficiency of income tax		$ 26,308.95

Blumenfield Enterprises, Inc.

EXHIBIT A

DEPRECIATION ADJUSTMENTS

Description of Property	Date Acquired	Cost	Depreciation Rate	Depreciation Fiscal Year Ended July 31, 1949 Claimed	Depreciation Fiscal Year Ended July 31, 1949 Allowed	Depreciation Fiscal Year Ended July 31, 1950 Claimed	Depreciation Fiscal Year Ended July 31, 1950 Allowed
Stockton Motor Movies:							
Paving	5-14-48	$ 68,492.00	10%	$13,699.26	$ 6,849.20		
Paving addition	10-1-48	1,037.00	10%	172.80	86.40		
Buildings	5-14-48	73,930.28	6 2/3%	7,393.03	4,928.69		
Buildings - addition	10-1-48	3,266.50	6 2/3%	272.20	181.47		
Fence	5-14-48	7,500.00	10%	750.00	750.00		
Speakers	5-14-48	14,184.57	25%	4,727.90	3,546.14		
Speakers - additions	8-1-48	784.53	25%	261.48	196.13		
Speakers - additions	10-1-48	1,606.63	25%	446.30	334.71		
	See footnote	Adjusted Basis as at July 31, 1947	Remaining Life from August 1, 1947				
Tivoli Theatre:							
Theatre building	(1)	$121,047.94	224 mos.	$ 7,522.05	$ 7,556.14	$ 7,392.29	$ 7,389.04
Office building	(1)	94,325.05	224 mos.	5,356.15	5,053.13	5,089.95	5,051.13
Equipment	(1)	7,891.58	104 mos.	1,023.20	909.96	256.80	227.54
Unrecovered cost of theatre (300 months from 11-1-49) - (9/12 year in 1950 F.Y.)	(2)	124,046.62				0.00	3,721.40
Improvements on theatre	(2)	1,432.91				0.00	42.99
Totals				$43,628.37 30,431.97	$30,431.97	$12,739.04 10,934.20	$ 16,783.29
Depreciation disallowed				$13,196.40		$ 1,804.84	

Note: For computation of cost of above items marked (1) see Exhibit A-1 attached
For computation of cost of above items marked (2) see Exhibit A-2 attached

EXHIBIT A-1

DETERMINATION OF BASIS FOR DEPRECIATION
As of August 1, 1947

	Amount	Portion Applied To: Theater Building	Equipment	Office Building	Land
Fee purchase:					
Relative values taken		15%	2.5%	32.5%	50%
Actual cost	$202,368.36	$ 30,355.25	$5,059.21	$ 65,769.72	$101,184.18
Merging unamortized leasehold costs	$140,032.36				
Relative values taken		72%	3%	0	25%
Actual cost	$140,032.36	$100,823.30	$4,200.97		$ 35,008.09
Improvements:	$ 36,174.34	$ 9,118.59	-	$ 27,345.75	-
(Allocation estimated per discussion with the accountant)	5,149.26	1,287.31	-	3,861.95	-
	4,211.00	-	-	4,211.00	-
	12,018.84	12,018.84	-	-	-
	$ 57,893.44	$ 22,424.74	-	$ 35,458.70	-
Total costs applied:	$400,294.16	$153,603.29	$9,260.18	$101,228.42	$136,192.27
Depreciation allowed or allowable to 7/31/47					
Revenue Agent's Report	$ 300.47	$ 300.47			
Return: 64% theater)	19,148.26	12,254.88		6,893.37	
36% office)					
10% of book value taken - 16/12 year	1,368.60		1,368.60		
		$12,555.35	$ 1,368.60	$ 6,893.37	
Adjusted basis 8/1/47		$141,047.94	$ 7,891.58	$94,325.05	$136,192.27

It is held that the total of fee purchase cost and the unamortised balance of leasehold cost approximate actual fair market value if the lease reflected fair rentals at the time of purchase, and the allocation gives substantially fair valuations to the portions in view of income and other valuation factors ascertainable.

Blumenfeld Enterprises, Inc.

EXHIBIT A-2

Adjusted basis of Tivoli Theatre Building at July 1, 1947 as computed in Exhibit A-1		$141,047.94
Less: Depreciation allowed or allowable:		
Fiscal year ended July 31, 1948	$ 7,556.14	
Fiscal year ended July 31, 1949	7,556.14	
Fiscal year ended July 31, 1950	1,889.04	17,001.32
Unrecovered cost as at November 1, 1949		$124,046.62
Improvements on Tivoli Theatre - cost		$ 1,598.42
Less: Depreciation allowed or allowable to November 1, 1949		165.51
Unrecovered cost as at November 1, 1949		$ 1,432.91

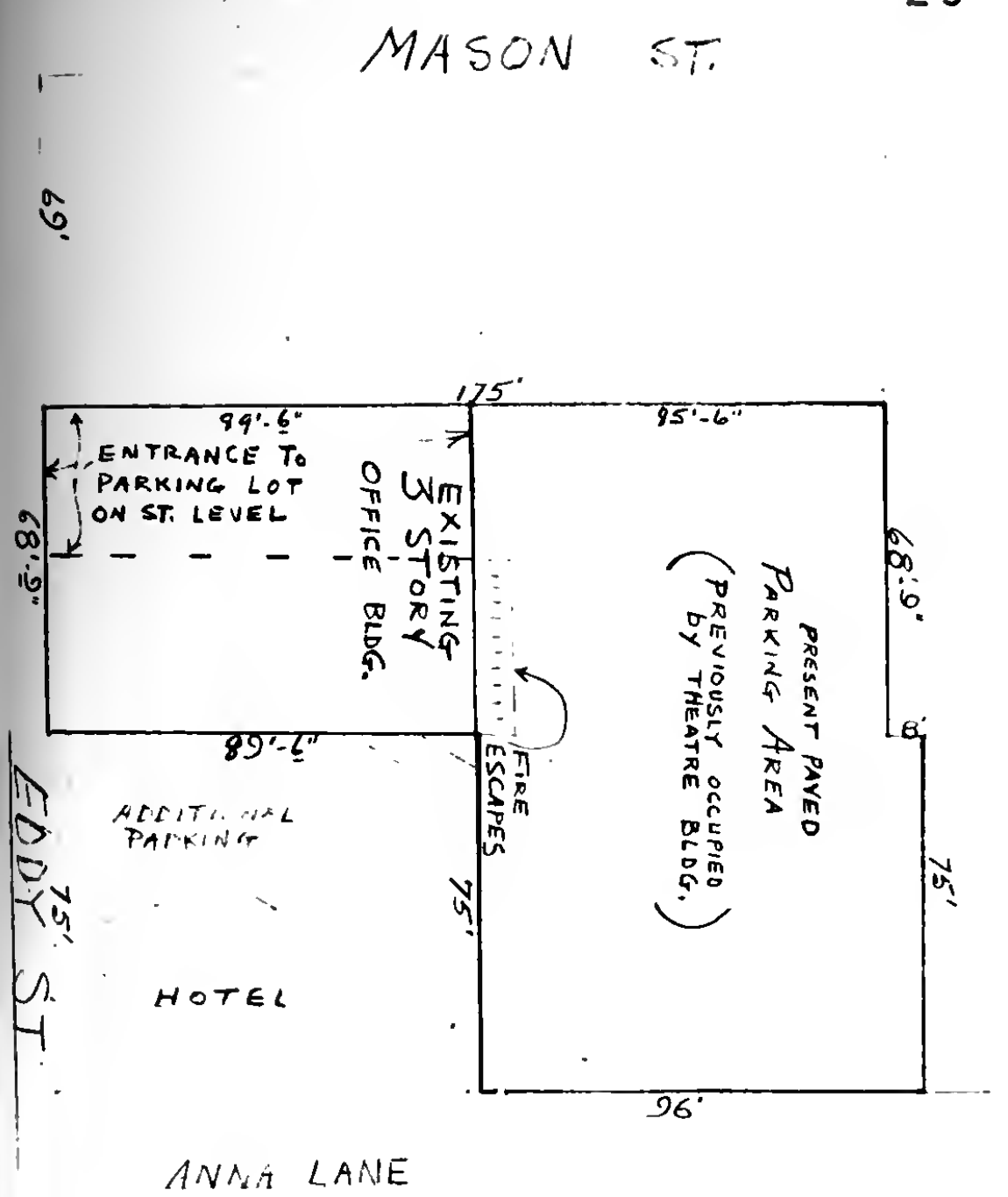

MASON ST.
69'
175'
99'-6"
ENTRANCE TO PARKING LOT ON ST. LEVEL
68'-9"
EXISTING 3 STORY OFFICE BLDG.
95'-6"
PRESENT PAVED PARKING AREA
(PREVIOUSLY OCCUPIED BY THEATRE BLDG.)
68'-9"
89'-6"
FIRE ESCAPES
ADDITIONAL PARKING
75'
75'
EDDY ST.
HOTEL
96'
ANNA LANE

Exhibit 2-B

LEASE

THIS INDENTURE, made this 6th day of October, 19 49

by and between BLUMENFELD ENTERPRISES, INC., a California corporation

hereinafter called "Lessor," and HARRY MOROFSKY, of the City and County of San Francisco, State of California

hereinafter called "Lessee,"

WITNESSETH:

In consideration of the rents herein reserved and of the covenants and agreements herein contained on the part of the Lessee to be kept and performed, the Lessor has demised and leased and does by these presents demise and lease unto the Lessee, and the Lessee has hired and taken and does by these presents hire and take from the Lessor the premises herein described for the term herein specified, subject to all the following terms, covenants and conditions:

1. PREMISES: The premises hereby leased are as follows:

The entire building known as the Tivoli Theatre Building, which has heretofore housed the premises known as the Tivoli Theatre, with the front entrance approximately thirty feet frontine on the north side of Eddy Street, known as No. 70 Eddy Street, between Anne Lane and Mason Street, together with the basement thereunder, and more partioularly designated and described for identification on the plat or sketch annexed hereto, marked "Exhibit A," and by such reference made a part hereof, all located in the City and County of San Francisco, State of California. The leased premises do not include any portion of the front building, nor the steirs, leading from the roof to the main entrance of the said building, with the exception of the downstairs ticket office and the foyer entrance and basement under said foyer. The said ticket office will have its own entrence, to be provided by and at the expense of the Lessee.

2. TERM: The term of this lease shall be for the following period:
Twenty-five years, commencing on May 1, 1950, and ending on the last day of April, 1975.

3. RENT: As rental hereunder the Lessee shall pay to the Lessor the following sum or sums in the manner following: The total rent in the amount of $420,000.00, payable at the rate of $1,250.00 per month, commencing on May 1, 1950, the receipt of which said first month's rental is hereby acknowledged, and the additional sum of $1,250.00 on the first day of each and every month thereafter, in advance, for the first ten years of said term, ending with the month of April, 1960; and commencing on the first day of May 1960, the monthly rental to be paid shall be the sum of $1,500.00, and a like sum of $1,500.00 to be paid on the first day of each and every month thereafter for the remaining fifteen years, until the full sum of $420,000.00 shall have been fully paid.

Said rental and all other sums which are to be paid or repaid by the Lessee to the Lessor hereunder shall be paid in [illegible] nf America at the following address: 70 Eddy Street, San Francisco, California

or at such other place as the Lessor may hereafter from time to time designate by a notice in writing. All rentals and other sums to be paid or repaid to the Lessor hereunder shall bear interest at the legal rate from the time when payable hereunder; and all such other sums may, at the option of the Lessor, be added to and collected as a part of any subsequent rental installment.

4. USE OF PREMISES: The Lessee shall use said premises for the purpose of conducting thereon the following and only the following business: A garage and storage and offices for the use of the Lessee in connection with garage operations, or concessions under-let hereunder to be used with office space, as hereinafter provided.

The Lessee shall not, without the written consent of the Lessor first had and obtained, use or occupy the demised premises or any part thereof for any purpose other than that hereinbefore specified, or fail so to use and occupy said premises, or permit said premises to remain vacant or unoccupied, or have or permit thereon any auction sale, or allow said premises or any part thereof to be used in any manner that will increase the rate of insurance thereon, ~~or burn, or use or keep thereon, on or on or in the building whereof the demised premises are a part, or permit to be burned, or used or kept thereon any gasoline, kerosene, distillate, or any petroleum product, or any explosive or inflammable substance, or use or occupy or permit to be used or occupied any street or sidewalk adjoining said premises for storage or business of any kind, or install or operate any machinery or apparatus which will tend to injure the building whereof the demised premises are a part or which will annoy other tenants of the Lessor, and, in any event, no machinery or apparatus shall be installed or operated on the demised premises without the previous written consent of the Lessor~~. Any increase of insurance premiums caused by any act or omission of the Lessee shall be paid by the Lessee to the Lessor on demand. The Lessee shall at the Lessee's sole cost install in said premises a fire extinguisher or extinguishers of such capacity and make as shall meet with the approval of the Lessor and shall periodically cause the same to be refilled or recharged, and, if the Lessee shall fail or omit to install and or refill or recharge said fire extinguisher or extinguishers, the Lessor may do so at the expense and for the account of the Lessee. The Lessee shall promptly report to the Lessor any damage or injury to the demised premises. The Lessee shall not commit or suffer to be committed any waste upon said premises, or any public or private nuisance or do any other act or thing which will disturb the quiet enjoyment of any other tenant in any building whereof the demised premises may form a part, ~~or use or install on said premises any piano, organ, or any other musical or sound producing instrument or any radio, loud speaker, amplifier or other similar sound producing device, unless the Lessor shall first have consented thereto in writing. The Lessee or the Lessee's agents or employees shall not solicit business from the sidewalk, vestibule or doorway of said premises. The Lessee or the Lessee's agents or employees shall not keep, maintain or place on the sidewalk adjoining the demised premises or in any vestibule or doorway to the demised premises any showcases, troughs or counters for any purpose whatsoever, except with the written consent of the Lessor. The Lessee shall not bring upon, have kept, sell or give away, nor permit or suffer any other person or persons to bring in, have kept, sell or give away in, upon or about the demised premises, or any part thereof, any intoxicating beverages whatsoever or, as long as any prohibition law shall be in force and effect, any beverages now or hereafter defined as intoxicating by or under any federal and or state statute~~ and the Lessee shall neither do nor permit or suffer to be done in, upon or about the demised premises, or any part thereof, any act which shall or might subject the Lessor to any liability or responsibility whatsoever under or by reason of the provisions of any statute, ordinance or other law. ~~The Lessee shall not sign any petition for or otherwise consent to the granting of any curb, sidewalk or street concessions or privileges to any peddlers, news vendors, busses, taxicabs, or other persons desiring to ply a trade or have a stand or station or otherwise do business in or about the front of the demised premises~~. The Lessee shall be liable to the Lessor for all damages or injuries that may be caused to the demised premises or to the building whereof the demised premises are a part by the Lessee or the Lessee's agents, clerks, servants, employees, customers, patrons, visitors and or persons making deliveries to the Lessee or in moving any personal property of whatsoever kind or character in or out of the demised premises. ~~The Lessor reserves and shall have the right to make and enforce reasonable rules and regulations for the use and occupation of said premises and the Lessee shall comply with all such rules and regulations, and, in this regard, the Lessee agrees faithfully to observe and strictly to comply not only with all the rules and regulations herein set forth but also such other and further reasonable rules and regulations hereafter from time to time promulgated, as the Lessor may in the Lessor's judgment deem necessary or proper for (a) the safety, care and or cleanliness of the demised premises and or the building whereof the same are a part, (b) the comfort of the tenants of any such building, and (c) the preservation of good order therein, and the Lessee shall also cause the Lessee's agents, clerks, servants, employees, customers, patrons and visitors faithfully to observe and strictly to comply with all such rules and regulations, all of which said rules and regulations are hereby incorporated as a part of this lease and to be faithfully kept and performed as aforesaid, by the Lessee hereunder~~.

5. **PRESENT CONDITION OF PREMISES**: The Lessee has examined said premises and acknowledges that the same and every part thereof are in a good and tenantable condition and that no representations in respect thereof have been made by the Lessor or the Lessor's agents prior to or at the time of the execution hereof and the Lessee accepts said premises as satisfactory in their present condition. The Lessor shall not be obligated to divide, make any change in, on or to, or install or do anything whatsoever in, to or upon the demised premises or any part thereof, nor clean or paint the demised premises, or any part thereof.

6. **DELAY IN DELIVERING POSSESSION**: If the Lessor for any reason cannot deliver possession of said premises to the Lessee at the commencement of said term, then this lease shall not be void or voidable, nor shall the Lessor be liable to the Lessee for any loss or damage resulting therefrom; but in such event there shall be a proportionate deduction of rent covering the period between the commencement of said term and the time when the Lessor can deliver possession.

7. **REPAIRS AND ALTERATIONS**: The Lessee shall, throughout the entire term of this lease, at the Lessee's sole cost and expense, keep the demised premises in good condition and repair and hereby expressly waives all rights to make any repairs at the expense of the landlord under the provisions of any statute, whether now in effect or hereafter enacted, authorizing a tenant to make repairs at the expense of the landlord. ~~Interior store fronts or windows of the demised premises shall not be permitted to become rotten or defective and shall be renewed at the Lessee's expense whenever demanded by the Lessor, and the Lessee hereby assumes the risk of damage or destruction of any such awning by the elements or by fire caused by the falling thereon of any lighted cigarettes, cigars, matches or similarly burning substances; and no awning shall, in the first instance, be installed by the Lessee without the Lessor's consent in writing~~. Should the Lessee fail to commence promptly the work of any repairs herein required by the Lessee to be made, then the Lessor shall have the right to make said repairs at the cost and expense of the Lessee, and any sums paid out by the Lessor for any such repairs shall be repaid by the Lessee to the Lessor upon demand. The Lessee shall, before making any except trivial re-

pairs, notify the Lessor of the Lessee's intention thereof before commencing the work of such repairs. The Lessee shall not make any additions, changes, alterations or modifications to the demised premises without the written consent of the Lessor. The Lessee shall keep all sidewalks abutting upon or adjacent to the demised premises clean, free from rubbish, dirt and/or waste material, in good order, condition and repair, including the replacing of all broken sidewalk lights.

8. **INSPECTION OF PREMISES:** The Lessor shall have the right to enter in and upon the demised premises at any and all reasonable times during said term, without interference or hindrance by the Lessee or the Lessee's agents or representatives, for the purpose of inspecting the same or of making such repairs as the Lessee is bound to make hereunder or for any other legitimate purposes. Said phrase "legitimate purposes" shall include, among other things, the right of the Lessor to enter in and upon the demised premises for the purpose of showing the same to prospective purchasers, mortgagees and lessees, and also to remove signs and other advertising matter placed in, on or upon said premises without the Lessor's written consent, and, in the event that any of the utilities of the building, whereof the demised premises are a part, are located either in whole or in part in the demised premises, to enter the same for the purposes of examining or inspecting said utilities and/or the making of repairs, replacements or substitutions in, to or upon such building utilities.

9. **ASSIGNMENT AND SUB-LETTING:** The Lessee shall not, without the written consent of the Lessor, assign, mortgage, pledge or hypothecate this lease, or any interest therein, or sublet said premises, or any part thereof, and no such consent shall be construed as a consent to any subsequent assignment or subletting. No assignment or sublease shall be valid until an executed duplicate original thereof shall have been delivered to the Lessor; nor shall any assignment or sublease release or discharge the Lessee from full liability hereunder. By the acceptance of an assignment the assignee shall become bound to keep and perform all the terms, covenants and conditions herein contained and shall pay the rent herein reserved and accruing from the time of such assignment.

10. **CHARGES FOR PUBLIC UTILITIES:** The Lessee shall pay all charges for water, gas, electricity, heat, telephone service and other public utilities used upon or furnished to the demised premises during said term, and if the Lessee shall fail to pay for any thereof the Lessor may pay said charges for the account of the Lessee and the Lessee shall repay the amount thereof to the Lessor upon demand. ~~In the event that any of said public utilities are furnished to the demised premises through a meter which measures also such public utility furnished to another tenant or other tenants of the Lessor, then the Lessee shall pay to the Lessor, as special rates, on the first day of each calendar month during said term the following amounts for such public utilities:~~

~~for water $ _____ for gas $ _____ for electric power $ _____,~~

~~and for electric light $ _____.~~

11. **SIGNS:** All signs and other advertising matter to be placed on or about the demised premises by the Lessee shall first have the written approval of the Lessor. The Lessor at any time after sixty days prior to the expiration of this lease shall have the right to place any usual or ordinary "To Let" or "To Lease" signs upon said premises.

12. **FIXTURES:** Any additions or improvements to the demised premises shall become at once a part of the realty and belong to the Lessor, but the Lessee shall have the right, at the expiration of the term hereby created, or any other termination of said term by mutual consent, to remove all the Lessee's movable furniture and trade fixtures, if the same can be removed without injury to said premises. Said right of the Lessee to remove such movable furniture and trade fixtures shall be conditional upon the restoration by the Lessee, at the Lessee's sole cost and expense, of the demised premises to the condition they were in before said furniture and trade fixtures were installed. All other fixtures, whether installed by the Lessee or by the Lessor, shall become or remain the property of the Lessor, provided, further, however, that all additions and/or improvements to the demised premises, together with all other fixtures, whether made and/or installed by the Lessee or by the Lessor, for the use and benefit of the Lessee, shall, at the option of the Lessor, be removed by and at the expense of the Lessee, and the demised premises shall be restored, at the option of the Lessor, to the condition in which they were before said additions or improvements and said other fixtures were made or installed.

13. **PERSONAL PROPERTY:** If the Lessee should abandon, vacate or surrender said premises, or be dispossessed by the Lessor by process of law or otherwise, then any personal property belonging to the Lessee and left on the premises shall, at the option of the Lessor, either be deemed to be abandoned or may be stored by the Lessor in any warehouse or elsewhere for the account of and at the cost of the Lessee. The Lessee shall pay all assessments and taxes during said term assessed against or levied upon any personal property situate in said premises, and if the Lessee shall fail to pay the same, then the Lessor may pay the same for the account of the Lessee, and the Lessee shall repay the Lessor the amount thereof upon demand. Should any substantial improvements or additions be made by the Lessee with or without the Lessor's consent to or upon the demised premises and should the taxes assessed upon or levied against said premises on account of such additions or improvements be increased, then such increased taxes shall be paid by the Lessee to the Lessor on demand.

14. **LAW OBSERVANCE:** The Lessee shall strictly conform to all laws and ordinances and all orders, regulations and requirements of any and every legal, governmental or military board, body, commission or officer relating to or in anywise affecting the Lessee's occupancy or use of said premises or the manner of the Lessee's performance of any term, covenant or condition hereof on the Lessee's part to be performed hereunder, as well as to all informal rules and regulations of said authorities, and also to all rules and regulations of the Board of Fire Underwriters of the Pacific Coast, and of any insurance company or association insuring said premises; and the Lessee shall indemnify and keep and save the Lessor forever harmless from any penalties, damages or charges imposed for any violation of the laws, rules, regulations or ordinances referred to, whether occasioned by neglect, omission or wilful act of the Lessee or of any person or persons occupying said leased premises during

said term. If the Lessee shall fail or omit to comply with the provisions of this paragraph, in whole or in part, the Lessor may, at the Lessor's option, at the expense and for the account of the Lessee, conform to all laws and ordinances and all orders, regulations and requirements, as above set forth, and any payments made or expenses incurred by the Lessor in so doing shall be repaid by the Lessee upon demand.

15. **LIENS FOR LABOR OR MATERIALS:** The Lessee shall keep said premises free and clear of any and all liens arising out of the making by the Lessee of any repairs, improvements, additions or alterations to said premises; and should any such lien become a charge against said premises, the Lessee shall promptly pay, satisfy and discharge the same. If the Lessee shall fail so to do, then the Lessor may pay the same and any amounts so paid by the Lessor shall be repaid by the Lessee to the Lessor on demand.

16. **LEASE SUBORDINATE TO CERTAIN LIENS:** This lease is and shall at all times be subject, junior and subordinate to all mortgages, trust deeds or bond issues affecting said premises or affecting any underlying lease covering the building and/or the premises whereof the demised premises are a part, or any part thereof, held by the Lessor, whether such mortgages, trust deeds or bond issues now exist or shall hereafter be placed thereon, and the Lessee shall execute, acknowledge and deliver on demand of the Lessor all documents requested by the Lessor to make this lease subject, junior and subordinate to any such mortgage, trust deed or bond issue and to every charge or lien thereunder affecting the demised premises, including any charge or lien for advances hitherto or hereafter made and covered by the terms of any such existing or future mortgage, trust deed or bond issue.

17. **ACCIDENT LIABILITY:** The Lessor shall not be liable for and the Lessee shall hold the Lessor harmless against all damages for personal injuries, including death at any time resulting therefrom, and all damages to any property by reason of any latent or patent defect in the construction of or in the condition of said premises during said term, and all loss or damage occasioned by storms, rains, snows, water, leakage, bursting or stoppage of any gas, water, steam, sewer or other pipes, whether any such pipes are upon said premises or not, and any loss or damage occasioned by reason of said premises being out of repair, and any loss or damage arising out of any act or omission of any cotenant or sub-tenant or other occupant or occupants either of the demised premises or of any adjoining premises or buildings. The Lessee hereby acknowledges that all dangerous places and defects in or about the demised premises are known to the Lessee and will be made and kept safe and secure by the Lessee at the Lessee's sole cost and expense.

18. **PLATE GLASS INSURANCE:** The Lessee shall, during said term, keep all plate glass belonging to the demised premises insured in such amount and in such insurance companies as shall be satisfactory to the Lessor, loss, if any, payable to the Lessor; and the Lessee shall pay the premiums therefor and deliver the policy or policies forthwith to the Lessor; and, if the Lessee shall fail so to do, the Lesssor may effect such insurance and pay the premiums therefor and the Lessee shall repay the Lessor the amount thereof on demand.

19. **LESSOR'S RIGHTS AND REMEDIES:** All the terms, covenants and conditions on the part of the Lessee to be kept and performed hereunder are conditions precedent to be kept and performed by the Lessee to entitle the Lessee to continue in the possession of said premises hereunder, and if the Lessee shall make default either in the paymeot of said rent or in the observance or performance of any other of said terms, covenants and conditions, or if the Lessee shall file a voluntary petition in bankruptcy, or be adjudicated a bankrupt, or commit any act of bankruptcy, or be adjudged an insolvent debtor under the insolvent debtor or bankruptcy laws of any state, or if any execution or attachment be issued against the Lessee or against any of the Lessee's property or effects and if as a result thereof there shall be an actual or attempted taking or occupation of the demised premises by someone other than the Lessee, or if the Lessee shall make a general assignment for the benefit of the Lessee's creditors or be placed in liquidation, or if in any judicial action or proceeding in any court against the Lessee, a receiver, liquidator, keeper, or other officer or agent shall take charge of said premises, or of the business conducted therein, or of any property therein, and shall remain in possession of any thereof for a period of three (3) days, or if this lease, or any interest or estate created hereby, shall vest in any other person or persons by operation of law or otherwise, except by the written consent of the Lessor and except by the death of an individual lessee, or if the Lessee shall fail to take possession of said premises hereunder or shall abandon or vacate said premises, then in each or any of said events the Lessor shall have the right and option to terminate all the Lessee's rights hereunder and to enter upon said premises either with or without process of law and remove all persons and property therefrom and re-possess and enjoy said premises as of the first and former estate of the Lessor; but no such re-entry by the Lessor shall be construed as an election to terminate this lease unless written notice to that effect shall be given by the Lessor to the Lessee; except that if this lease or any interest or estate created hereby, shall, as aforesaid, vest in any other person or persons by operation of law or otherwise, except as aforesaid, then this lease shall ipso facto terminate and the Lessee shall be released from the liability to pay any further rental not in arrears, and in no event shall this lease be treated as an asset of the estate of the Lessee in case of bankruptcy or as an asset of the Lessee after the Lessor's exercise of any right or option of re-entry.

If the Lessor shall commence any summary action or proceeding under any unlawful detainer act or similar statute for the forfeiture of this lease and/or for the possession of said premises, then the Lessor shall have the right to have a receiver appointed by the court, without any notice to the Lessee, to take possession of said premises and collect any rent that may be or become due from any sub-tenant and to hold the same during the pendency of said action, subject to final disposition by the court; and, if such a receiver be appointed at the instance of the Lessor, such receiver may, if it be necessary or convenient in order to collect such rents and the profits derived from any business carried on on said premises, conduct the business of the Lessee then being carried on upon said premises and take possession of any personal property belonging to the Lessee and used in the conduct of such business and use the same in conducting such business on said premises, without

compensation to the Lessee. The Lessee hereby appoints the Lessor as the Lessee's attorney-in-fact with irrevocable power during the pendency of any such summary proceeding and until the appointment of such a receiver, to collect from any and all sub-tenants the rents due or to become due from any such sub-tenant during the pendency of such proceeding. The Lessee hereby waives any right of redemption of said premises that is now or may hereafter be given by any such statute, or otherwise, and also waives any and all notices to dispossess the Lessee preliminary to the institution of any such summary proceeding.

If the Lessee shall fail to take possession of or shall abandon, vacate or surrender said premises (unless the Lessor shall by notice in writing accept a surrender of said premises and therein expressly release the Lessee from all obligations hereunder), then the Lessor shall have the right and option to re-enter said premises, with all the aforementioned rights incidental to re-entry, and re-let said premises for the account of the Lessee on such rentals, terms and conditions as the Lessor may deem proper, using reasonable endeavors to secure a reasonable rental, and to apply any moneys that may be collected on account of such rentals, less the expenses of renting said premises and collecting said rentals, on account of the rentals to be paid by the Lessee hereunder and to hold the Lessee liable for any deficiency, but no such re-letting shall operate as a waiver of any right or remedy of the Lessor against the Lessee. No such re-entry by the Lessor shall be construed as an election to terminate this lease unless written notice to that effect shall be given by the Lessor to the Lessee. The Lessee shall pay any such deficiency of rental month by month on the demand of the Lessor.

The Lessee shall indemnify the Lessor against and shall pay and discharge any and all reasonable or proper costs and expenses (including all reasonable attorneys' and counsel fees) that may at any time or times result from or arise out of, or that the Lessor may be put to, sustain or incur by reason of any default or failure on the part of the Lessee to comply in any respect with or to observe any requirement or provision of this lease or that the Lessor may sustain, be put to or incur in enforcing or properly seeking to enforce any of the terms, covenants or conditions hereof; and if any suit or action should be commenced against the Lessor by the Lessee or any assignee or sub-tenant of the Lessee in respect of any matter arising out of this lease, and the Lessor shall wholly or partly prevail in any such suit or action, then and in that event the Lessee shall also pay the costs and expenses of the Lessor in connection with any such suit or action together with the Lessor's reasonable attorneys' and counsel fees therein. Whenever any such attorneys' or counsel fees are paid or incurred by the Lessor in connection with any court proceedings whatsoever in respect of any matter arising out of this lease the reasonable amount thereof shall, if possible, be determined and fixed by the court having jurisdiction of any such court proceeding.

Each and all of the various rights, powers, options, recourses and remedies of the Lessor contained or provided for in this lease shall be construed as cumulative and no one of them as exclusive of the other or as exclusive of any rights or remedies allowed by law. Recourse by the Lessor to any deposit, guaranty, collateral engagement, or other security for the Lessee's performance of all or any of the terms, covenants and conditions herein shall be cumulative, independent of and in addition to any and all other rights and remedies of the Lessor, whether contained in this lease or in another instrument, or otherwise, or provided for by law, and the Lessor shall not be required to exhaust or look to any such security before exercising or prosecuting any of such other rights or remedies. The Lessor may transfer and/or deliver any such security, as such, to the purchaser of the reversion, in the event that the reversion be sold, or the underlying lease or leases held by the Lessor be assigned, and thereupon the Lessor shall be discharged from any further liability in reference thereto. No delay of the Lessor in enforcing any right, remedy, privilege or recourse accorded to the Lessor, or which the Lessor may be or became entitled to recoverics thereon, shall affect, impair, diminish, suspend or exhaust any of such rights, remedies, privileges or recourses. In the event of a breach or threatened breach by the Lessee of any of the terms, covenants, conditions or provisions of this lease, the Lessor shall be entitled to apply for and to obtain an injunction to prevent said breach or threatened breach, and the Lessee hereby waives the benefit of every statute and/or rule declaring or defining either remedies or rights by or for injunction that may otherwise operate to prevent the issuance of any injunction against the Lessee. If the Lessee should make default in the fulfilling, keeping, observing or performing of any or all of the covenants, conditions or agreements in this lease set forth and contained on the part of the Lessee to be fulfilled, kept, observed and performed, the Lessor may at the Lessor's option immediately or at any time thereafter, without notice, perform the same for the account of the Lessee and the Lessee shall immediately, upon demand, pay the Lessor the moneys expended and/or the expenses incurred by the Lessor in connection therewith.

20. **CONDEMNATION AND EMINENT DOMAIN:** If the demised premises, or any part thereof, or the building of which the same are a part, or any part of such building shall be condemned or if the same or the land upon which said building is erected, or any part of said land, should be taken by virtue of the exercise of the power of eminent domain or for any public or quasi public improvement or purpose, the Lessor shall have the right to cancel and terminate this lease and end the term thereby demised, by giving the Lessee five days' personal or written notice of the exercise of such right, and upon the giving of such notice this lease shall expire and be cancelled and terminated and the term thereby demised come to an end by lapse of time on the fifth day thereafter, as if that day were the date in this lease distinctly fixed for the expiration of the demised term, and the Lessee shall and hereby agrees to vacate and surrender the demised premises five days after the giving of such notice. Should the notice be in writing, it shall be enclosed in a sealed, post-paid envelope and addressed to the Lessee at the demised premises, and be sent to the Lessee by registered United States mail, and the five day period above referred to shall commence to run from the date of such mailing. If in any condemnation or other similar proceeding an award be made to the Lessee, said Lessee shall have no right to collect or receive the award or any part thereof, and the Lessee hereby assigns and transfers to the Lessor any and all such awards for damages.

21. **ABATEMENT:** If during said term, under any present or future laws, or any other governmental authority, any order of abatement or any order or judgment preventing the use of said premises by the Lessee

shall be made upon the ground that said premises or any part thereof constitute a nuisance, or are used, or have been used in violation of law by the Lessee, or the Lessee's agents, officers or employees, then the Lessee shall not be released thereby from any of the Lessee's liabilities or obligations hereunder, including the Lessee's liabilities and/or obligations to pay the reserved rental hereunder.

22. **DESTRUCTION OF LEASED PREMISES:** If the demised premises, or the means of access thereto, be damaged by fire, the Lessee shall give immediate notice thereof to the Lessor, and the damage thereto shall be repaired as speedily as possible, after the receipt of such notice, by and at the cost and expense of the Lessor. If the demised premises be rendered totally or partially untenantable as a result of damage thereto by fire, and the damage be not due to any fault or neglect on the part of the Lessee or the Lessee's agents, clerks, servants, employees, customers, patrons or visitors, from and after receipt by the Lessor of the Lessee's notice of the damage, rent shall (a) cease until the repairs shall have been completed, if the demised premises are wholly untenantable; or (b) abate proportionately until the repairs shall have been completed, if the demised premises are partially untenantable; i. e. in the same proportion that the untenantable part of the demised premises bears to the entire demised premises. If, as a result of fire, the elements or other casualty or catastrophe, the building of which the demised premises are a part be destroyed or so damaged (whether the demised premises be damaged or not) that the Lessor shall decide to rebuild, the Lessor shall have the right to cancel and terminate this lease and end the term thereby demised by giving the Lessee, within thirty days from the date of the destruction or damage, five days' personal or written notice of the exercise of such right, and upon the giving of such notice this lease shall expire and be cancelled and terminated, and the term thereby demised come to an end by lapse of time on the fifth day thereafter, as fully and completely as if that day were the date in this lease distinctly fixed for the expiration of the demised term, and the Lessee shall and hereby agrees to vacate and surrender the demised premises five days after the giving of such notice. Should the notice be in writing, it shall be enclosed in a sealed, post-paid envelope and addressed to the Lessee at the demised premises and be sent to the Lessee by registered United States mail, and the five day period above referred to shall commence to run from the date of such mailing. Should any question arise between the Lessor and the Lessee as to whether or not repairs have been made with reasonable dispatch, due allowance shall be made for delays connected with the adjustment of the loss under the insurance policies and those caused by or due to what are commonly known as "labor troubles."

23. **WAIVERS:** None of the covenants, terms or conditions of this lease to be kept and performed by the Lessee shall in any manner be waived, amended, altered, modified or abandoned, except by a written instrument duly signed and delivered by the Lessor, and not otherwise, and no act or acts, omission or omissions, or delays, or series of acts or omissions, or waiver, acquiescence or forgiveness by the Lessor as to any failure of performance either in whole or in part by the Lessee of any of the covenants, terms or conditions of this lease shall be deemed or construed to be a waiver by the Lessor of the right at all times in the future to insist upon the full and complete performance by the Lessee of each and all of the said covenants, terms and conditions thereafter to be kept or performed hereunder; nor shall an acceptance of surrender of this lease be effected without a written consent thereto by the Lessor.

24. **NOTICES:** All notices or demands from the Lessee to the Lessor, whether under any provision hereof or under any provision of law, shall be made in writing and mailed by registered mail, postage thereon fully prepaid, addressed to the Lessor at the address at which the rentals hereunder shall be payable as hereinbefore provided and all such notices or demands from the Lessor to the Lessee shall be made in writing mailed by registered mail, postage thereon fully prepaid, addressed to the Lessee at the address of the demised premises, or by leaving such notice or demand at said premises with the Lessee or with some person employed by the said Lessee, or apparently in charge of said premises, over the age of eighteen years, or, if said premises be closed, by depositing said notice or demand under the front door of said premises between the hours of nine o'clock A. M. and five o'clock P. M. in an envelope addressed to the Lessee.

25. **YIELDING POSSESSION:** On the last day of said term or other prior termination of this lease, the Lessee shall peaceably and quietly leave, surrender and yield up to the Lessor the demised premises in good order, condition and repair, reasonable use and wear thereof and damage by the elements, not happening through any negligence of the Lessee, excepted.

26. **HOLDING OVER:** Any holding over after the expiration of said term with the consent, express or implied, of the Lessor, shall be a tenancy from month to month, at a monthly rental, payable in advance, equal to the highest monthly installment of rent payable hereunder. Such month to month tenancy shall be subject to termination at the end of any month on three (3) days' written notice to the Lessee, and shall otherwise be on all the terms, covenants and conditions herein contained, so far as applicable.

27. **QUIET POSSESSION:** The Lessee, keeping and performing all of the terms, covenants and conditions hereof on the Lessee's part to be kept and performed hereunder, shall at all times during said term peaceably and quietly have, hold and enjoy the said premises, without suit, trouble or hindrance from the Lessor; subject, however, to the mortgages, trust deeds or bond issues hereinbefore mentioned and provided for, also the provisions of any underlying lease held by Lessor covering in whole or in part the demised premises or the building or premises of which same are a part. The Lessor reserves the right to request all persons who may seek admission to any theatre which is or may be located in the same building in which the demised premises are located, to form in line in front of the main entrance to said theatre, and if necessary to extend said line on the sidewalk in front of the demised premises, and the extension of such line on the sidewalk in front of the demised premises shall not be a breach of any term, covenant, condition or agreement on the part of the Lessor, notwithstanding anything herein to the contrary contained.

Exhibit 3-C—(Continued)

28. Interpretation: The language in all parts of this lease shall in all cases be construed as a whole and simply according to its fair meaning, and not strictly for or against either the Lessor or the Lessee.

If the designation of the Lessee in the introductory portion of this lease shall include more than one individual, then all of such individuals shall be jointly and severally liable hereunder and the term "Lessee" as herein used shall connote both the disjunctive and the conjunctive sense.

Wherever in this lease any words of obligation or duty regarding either party are used, such words or expressions shall have the same force and effect as though made in the express form of covenants.

Each and all of the covenants, agreements, obligations, conditions and provisions of this lease shall inure to the benefit of and shall bind (as the case may be) not only the parties hereto, but each and all of the heirs, administrators, executors, successors and assigns of the respective parties hereto, or either of them; and whenever and wherever a reference is made to the Lessor herein or to the Lessee herein, such reference shall be deemed to include the respective heirs, administrators, executors, successors and assigns of the Lessor or the Lessee as the case may be; provided, however, that nothing contained in this paragraph or provision shall be construed to permit or validate any assignment of any interest of the Lessee contrary to the provisions hereinbefore set forth in respect of any assignment by the Lessee.

Exhibit 3-C—(Continued)

29. Special Provisions:

(a) As further rent hereunder, Lessee agrees to pay prior to delinquency all real property taxes, rates, assessments, charges of every name, nature and kind whatsoever, which may be levied, assessed or imposed upon the rear theatre building only, the leasehold of Lessee or upon the estate hereby created, or upon Lessor by reason of ownership of the fee underlying this lease during the term of this lease. With reference to such taxes, rates, assessments and charges, for the first year of the term the same shall be divided between the Lessor and the Lessee equally, but for the last year of the term, or for the year during which this lease may be sooner terminated, the same shall be prorated between the Lessor and the Lessee, and the Lessee shall be obligated to pay only his prorata share thereof, determined on the basis of the number of months of the then current fiscal year that this lease shall be in effect. If the Lessee in good faith shall desire to contest the validity or amount of the taxes, rates, assessments or charges he shall notify the Lessor in writing of his intention so to do, and Lessee may thereupon defer the payment of the same so long as the validity or amount of the same shall be contested by the Lessee in good faith and by appropriate proceedings. The Lessor agrees to render to Lessee all assistance reasonably possible without expense to the Lessor in contesting the validity or amount thereof, including joining in and signing any protests or pleadings which the Lessee

Exhibit 3-C—(Continued)

may deem it advisable to file. It is agreed that should any rebate be made on account of sums paid by Lessee, or should any award be made in any way arising out of or in connection with the work or improvements for which the same has been levied, then the amount of such rebate or award shall belong to and be paid to the Lessee.

(b) The Lessor, in this paragraph grants to the Lessee the right to install as many floors as the Lessee may find necessary for the proper operation of a garage and storage purposes, however it is agreed that the Lessee hereunder is obligated to install only the basement floor, first and second floors.

Lessee agrees to remodel, alter and reconstruct the leased premises for the purpose of conducting a garage and maintaining storage thereof, as well as offices for the use of the Lessee in connection with garage operations or concessions which may be underlet hereunder to be used with office space, and all such alteration, change and reconstruction shall be at Lessee's sole cost and expense; and in this respect, the Lessor consents to such alteration, change and reconstruction, provided the same is made strictly in accordance with certain plans and specifications bearing the date of....., and the written approval of the Lessor endorsed thereon, for which Permits were or will have been granted by the proper public authorities. The Lessee is hereby further granted the right to erect additional floors in said building, in accordance with plans and spe-

Exhibit 3-C—(Continued)

cifications already approved in writing, provided the same are used for garage and storage purposes; that the said plans and specifications are hereby incorporated herein by reference and made a part hereof. The Lessee further agrees that the remodeling, reconstruction and change of the first and second floors of said demised premises shall be completed no later than May 1, 1950; and in this respect, it is further mutually understood and agreed that without regard as to the date of said completion, the rental obligations on the part of the Lessee shall commence on May 1, 1950.

(c) All Permits of every kind and character for the remodeling, reconstruction and change of the demised premises must be procured by the Lessee from the proper governmental authorities, whether city, county, state and federal, before the commencement of the work, and all such Permits shall be made available at all times for inspection by the Lessor; and in this respect, the Lessee agrees that no work shall be commenced unless and until said Permits are issued and outstanding and remain unrevoked, and the work to be done in respect thereto must be authorized by the Lessor in writing.

(d) No change is to be made in the existing fire escape and stair facilities which are now connected to the south side of the rear theatre wall, and also connected with the rear part of the office building. The said fire escape and stair facilities are to be left intact for the safety of the tenants occupying the said office building, and in the event the fire

Exhibit 3-C—(Continued)

escapes on the front of the office building lead to any of the said outlets hereinbefore referred to, then the same may be used by the parties hereto and by the tenants occupying the office building adjacent to the demised premises.

(e) The Lessee agrees to require from his contractor that he will carry public liability insurance from the commencement of the work to be done and while it is in progress, and that such insurance will provide that the Lessee and Lessor will be held harmless from any and all responsibility of accidents during the remodeling, reconstruction and change, and the Lessee agrees to supply to the Lessor duplicate originals of such insurance policies.

(f) Lessee agrees to notify the Lessor in writing immediately when the contract for the remodeling, reconstruction and change has been signed, and the granting of the Permits hereinbefore referred to has been accomplished, in order to allow the Lessor to place a non-responsibility notice on the building before any work is started, and permit the Lessor to record the original notice in the Recorder's office of the City and County of San Francisco, and otherwise protect itself against liens for labor, and materials, referred to in Paragraph 15 hereof.

(g) Lessor agrees not to remove the marquee frame and roof thereto, and the same may be used by the Lessee. The Lessor agrees that all personal property remaining in the leased premises will be removed by it at its own cost and expense prior to the time of the commencement of the remodeling and

Exhibit 3-C—(Continued)

reconstruction. All electric motors, theatrical switchboards, front doors, ventilators and fans, chairs, drapes, electric fixtures and carpets now installed in the leased premises, are reserved to the Lessor and are not included in the within lease. The Lessor agrees to remove the said miscellaneous property immediately when notice has been received by it in writing from the Lessee that the contracts for remodeling and reconstruction have been let and Permits have been granted for the commencement of the work to be done in connection therewith. Lessor agrees however to leave for Lessee's use such electric panels and ventilating fans with motors which may be necessary for Lessee's use of the premises.

(h) It is further agreed between the parties that in the event that any switches, meters, and other installations are left in any of the basements of the property occupied by the Lessor or its tenants, which are being used directly or indirectly in the building facing on the Eddy Street side of No.... Eddy Street, or belonging to any of the tenants occupying any portion of said building, permission is hereby granted to the Lessor and its tenants, or any of them, to enter such premises, even though part of the demised premises, wherever and whenever necessary. The main switch is to be split and direct wire to be placed for the use of the Lessee herein, so that such electricity and power as the Lessee may use is to be included on the Lessee's own meter, and all work to be done at Lessee's own cost and expense.

Exhibit 3-C—(Continued)

(i) In the event the Lessor shall determine to sell the property herein leased at any time during the term hereof, the Lessee shall have the first option for a period of thirty days from the time that written notice is given by the Lessor to the Lessee of its willingness to sell the same; purchase price of said property to be such sum as may be mutually agreed upon; and if a satisfactory agreement is reached concerning the sale of said property, the Lessee shall have sixty days within which to consummate the said sale by the payment of the full purchase price thereof.

(j) In the event of any increase of insurance premiums caused by the reconstruction, remodeling and change hereinbefore referred to, or caused by the nature of the business carried on by the Lessee, or caused by the use and maintenance upon the demised premises of any gasoline, kerosene, distillate, or any petroleum product, or any explosive or inflammable substance, or for any other reason whatsoever, such increase of insurance premiums shall be paid by the Lessee to the Lessor on demand; and in this respect, the Lessor agrees throughout the term of the lease to carry fire insurance upon the leased premises in an amount equal to at least ninety per cent of the insurable value above the foundation walls, and shall supply to Lessee certificates of insurance evidencing such coverages.

(k) In the event of either a total or partial destruction of the demised premises, the Lessor agrees

Exhibit 3-C—(Continued)

to apply to the cost of repair or restoration of said premises so much of the funds as the Lessor may receive from the proceeds of policies of insurance, and in case the proceeds of insurance policies are insufficient for the complete restoration or rebuilding of the premises to the condition in which they were prior to such destruction, the Lessee agrees to assume full responsibility for the balance of the cost of such repair and restoration.

(l) Notwithstanding anything herein to the contrary set forth, the Lessee may at any time, or from time to time during the term of this lease, sub-let all or any portion of the demised premises, subject, however, to the following conditions; that no sub-letting shall operate to release or relieve Lessee from his obligations or liability under this indenture, or any of them, and that such sub-letting shall be subject to all, and in no wise impair any, of the terms, covenants and conditions of this lease to be kept and performed by Lessee; and provided further, that such sub-letting must be for use similar to the uses for which the original tenant has been permitted to use and occupy the demised premises; and provided further, that Lessee shall as a condition to any such sub-lease, within ten days after making any sub-lease, notify the Lessor in writing of the name, place of business and residence and address of the sub-lessee, and deliver to the Lessor an executed copy of the sub-lease; and provided further, that such sub-lease shall be duly executed and acknowledged by both the sub-lessor

Exhibit 3-C—(Continued)

and the sub-lessee before a Notary Public, and that such sub-lease shall contain a clause to the effect that the sub-lessee agrees to observe all of the terms, covenants and conditions in this lease contained, save and except the rental accruing hereunder, and that said sub-lessee will comply with and be bound by all of the same; and unless the conditions hereinbefore set forth are complied with, such sub-letting shall at the option of the Lessor be ineffectual for all purposes.

(m) The Lessor hereby grants to Lessee the right at any time following the completion of the reconstruction, remodeling and change in the leased property as above set forth, to assign all of Lessee's right, title and interest in this lease to a California corporation hereafter to be formed, for the purpose of conducting the business of the Lessee in the demised premises pursuant to the terms of this lease, whose principal place of business shall be in San Francisco. This right to assign, however, is granted upon the following conditions:

(1) That Lessee at the time of assignment is not in default in any payment of any rentals or the performance of any of the covenants set forth in this lease.

(2) That Lessee has exhibited to Lessor receipted bills showing that the cost of the work concerning the reconstruction, remodeling and the changes in the leased property has been paid in full.

(3) That Lessee shall procure and deliver to the Lessor a letter from a responsible title insurance

Exhibit 3-C—(Continued)

company in San Francisco certifying that a notice of completion of the said work hereinbefore referred to has been recorded in the Office of the Recorder of the City and County of San Francisco, and 60 days have expired since the recording thereof, and that no liens have been filed against the property upon which the demised premises are situated for labor or services performed or materials furnished in connection with said work.

(4) That Lessee has notified Lessor in writing not less than five days prior to such assignment of the name of the corporation to which this lease is to be assigned, together with the names of the President and Secretary thereof, as well as the Directors thereof, and the address of the principal place of business of said corporation.

(5) That said assignment shall be in such form as is generally used, excepting that such assignment shall not change or modify any of the terms or covenants herein contained, and shall contain an acceptance of the said lease by the new Lessee, under the terms of which acceptance the new Lessee shall agree to pay all of the rental provided for in the lease and to perform all of the covenants set forth in said lease.

(6) That within five days after the execution of said assignment and acceptance thereof, the Lessee shall deliver to the Lessor a fully executed copy of said assignment and acceptance, together with a copy of a resolution passed at a meeting of the Board of Directors of said corporation at which

Exhibit 3-C—(Continued)

a quorum was present and voting, which resolution shall authorize the officers of said corporation to execute the acceptance of said assignment. Said copy of the resolution is to be certified to by the Secretary of said corporation as being a true and correct copy of said resolution, and is to have the corporate seal attached thereto.

Lessee agrees that this consent to the assignment of said lease shall not be construed as a consent to a further assignment of this lease or a waiver of any of the provisions hereof.

(n) Lessee agrees during the full term of this lease to carry public liability insurance and a so-called garage insurance policy covering the demised premises, its appurtenances and sidewalks fronting thereon, in an amount of $100,000.00 for injury or death to any one person, and $500,000.00 for injury or death to any number of persons in any one accident, in a company satisfactory to the Lessor, which said policy shall be in the joint names of Lessor and Lessee, and the Lessee agrees to pay the premiums therefor and to deliver said policies or duplicates thereof to the Lessor, and the failure of the Lessee either to effect said insurance in the names herein called for, or to pay the premiums therefor, or to deliver said policies or duplicates thereof unto Lessor, shall permit the Lessor itself to effect said insurance and to pay the requisite premiums therefor, which said premiums shall be repayable unto it with the next installment of rental, and the failure to repay the same shall carry with

Exhibit 3-C—(Continued)

it the same consequence as failure to pay any installment of rental. The insurer mentioned in this paragraph shall agree by endorsement upon the policy or policies issued by it or by independent instrument furnished to Lessor, that it or he will give the Lessor fifteen days' written notice before the policy or policies in question shall be altered or cancelled; and in this respect Lessee further agrees that before the commencement of the remodeling or reconstruction of the demised premises, he will have included in said policies of insurance coverage of said remodeling and/or reconstruction, as follows:

(1) Property damage insurance in the sum of $100,000.00, protecting the Lessor, its tenants, and the general public, from any loss or damage to their property caused by the remodeling and/or reconstruction of the demised premises and/or the building of which the demised premises are a part.

(2) Public liability insurance in the names of the Lessor and the Lessee, protecting them from any loss or damage occasioned by injury to anyone whomsoever caused by the remodeling and/or reconstruction of the demised premises and/or the building of which the demised premises are a part.

All of these insurance policies are to be written by responsible insurance companies of established reputation, and Lessee agrees to deliver the original or a duplicate thereof of each policy to the Lessor at least seven days before the commencement of any work on the building.

Exhibit 3-C—(Continued)

(o) Notwithstanding anything herein to the contrary contained, the Lessor agrees that the Lessee shall have the right to place a sign over the roof of the rear part of the said building, provided, however, that the Lessee shall assume full responsibility for its installation and maintenance, together with the procurement of adequate public liability insurance in connection with said sign, and the Lessee shall likewise assume full responsibility for any damage that the installation or maintenance of said sign may cause to the roof of the demised premises. Lessee shall further have the right to erect and maintain a suitable sign and marquee over the entrance to said leased premises.

(p) Notwithstanding anything herein to the contrary set forth, it is agreed by and between the Lessor and the Lessee that in any proceeding by the public authorities, by condemnation or otherwise, whereby all or part of the demised premises are taken or sought to be taken for any such purposes, the Lessor and/or the Lessee herein shall each be free to make claim against the condemning party for the amount of damage claimed, and the Lessee shall have the same right to an award for any damages Lessee may sustain even though the Lessor avails itself of the option hereby given to the Lessor to terminate the unexpired term of this lease.

(q) Notwithstanding anything herein to the contrary contained, if as a result of fire, the elements, or other casualty or catastrophe, the building of which the demised premises are a part be destroyed

Exhibit 3-C—(Continued)

or so damaged that the Lessor shall decided not to rebuild, and if the Lessor exercises its right to cancel and terminate this lease a(s) provided in Paragraph 22 hereof, then, and in any such event, the Lessor agrees to pay to the Lessee the unamortized portion of the capital expenditures incurred by the Lessee in connection with the remodeling, reconstruction and changes in the demised premises hereinbefore referred to; provided, however, that such fire, casualty or catastrophe shall not have been caused by the carelessness or the negligence of the Lessee; and provided, as above set forth, there shall have been exhibited to and retained by the Lessor all receipted bills showing the cost of the remodeling, reconstruction and changes made in the demised premises by the said Lessee.

(r) The Lessee acknowledges that the Lessor would not have entered into this lease agreement but for the guarantee by Herman Hertz annexed hereto and made a part hereof, and entered into contemporaneously herewith.

GUARANTEE

In Consideration of the execution and delivery of the foregoing lease contemporaneously with the execution and delivery by the undersigned of this guarantee, the undersigned does hereby guarantee the performance of all of the terms, covenants and conditions of the annexed and foregoing lease by the Lessee therein designated during the first two years of the term therein provided for; provided,

Exhibit 3-C—(Continued)

however, that the liability of the undersigned, as guarantor, shall not exceed the sum of $10,000.00; and in the event that the undersigned guarantor is required to pay all or any part of the sum herein guaranteed, he reserves the right at his option to require an assignment of the said lease from the Lessee or from the corporation assignee referred to in the annexed lease, in which event, upon the execution and delivery of such assignment the undersigned agrees to perform all of the terms, covenants and conditions of the said lease, all with the same force and effect as if the undersigned had been designated as the original Lessee; and in any such event, it is further understood and agreed that the Lessor herein agrees to such assignment; and the undersigned further acknowledges that the agreement on the part of the Lessor to any such assignment to the undersigned shall not be construed as a consent to a further assignment of the said lease by the undersigned, or a waiver of any of the provisions of said lease. In the event that the undersigned does not exercise the aforementioned option, his obligations shall be limited as aforesaid to the sum of $10,000.00, which shall be payable in lawful money of the United States to the said Lessor.

Dated: October 6, 1949.

/s/ Herman Hertz, Guarantor

In Witness Whereof, the respective parties hereto have hereunto subscribed their names, and, if either party be a corporation, then the corporate name of

Exhibit 3-C—(Continued)

such corporation has been hereunto subscribed and its corporate seal hereto affixed by its officers thereunto duly authorized, the day and year hereinbefore first written.

. . . . . .

. . . . . .

EXHIBIT 4-D

Executive Offices Blumenfeld Theatres, 70 Eddy Street, San Francisco 12, California. Yukon 6-1282. April 24, 1950

Mr. M. L. Rose
M. L. Rose Company, Inc.
Flood Building, San Francisco, California

Re: Tivoli Theatre Property

Dear Mr. Rose:

You are hereby given authority to negotiate for the sale of the above captioned property to Mr. Herman Hertz et al, upon the following conditions:

1. The sale price is to be $350,000.00.

2. The sum of $25,000.00 is to accompany the sale agreement, in consideration for which the Purchaser shall have an option to conclude the deal within one (1) year.

3. If the deal is concluded within the option period herein specified, the purchaser shall pay to the Seller $225,000.00 in cash from the proceeds of a first Deed of Trust. In the event the lending institution will only lend a lesser amount, but not lower than $200,000.00, then the Purchaser shall

make up the deficiency between the amount of the loan and the $225,000.00 within three years. All sums received from the proceeds of the loan, even though in excess of $225,000.00, shall be payable to the Seller.

4. The Seller agrees to carry a second Deed of Trust in the amount of $100,000.00 behind a life insurance company loan, payable at the rate of $15,000.00 per year and bearing interest at the rate of four and one-half (4½%) per cent per annum.

5. In the event the Purchaser does not conclude the purchase of the property within one (1) year, the $25,000.00 mentioned under No. 2 above shall remain with the Seller as additional lease deposit under that certain lease dated the 6th day of October, 1949, between Blumenfeld Enterprises, Inc., as lessors, and Harry Morofsky, as lessee, and shall be deducted from rentals at the end of the lease term. In consideration of this additional lease deposit, the lessors grant to the lessee permission to demolish the rear portion of the premises for the purposes conforming to said lease and further provided the lessee shall furnish to the lessor modified plans showing the proposed basement and ground floor development and shall secure from the lessors written permission for said development. All of the cost of demolishing and improving shall be at the lessee's sole cost and expense.

6. The Seller, as the lessor, expressly retains all of their rights under the aforementioned lease dated October 6, 1949, and makes no waiver of any of the conditions of said lease, including but not limited

to the $10,000.00 guarantee by Mr. Herman Hertz.

7. In the event the Purchaser exercises his option to purchase within the one (1) year period, then he shall be given credit by the Seller for the net gross profit from the operation of all of the premises in the interim period. The Seller shall deduct from said rentals, taxes, insurance, utility costs and all other legitimate items of expense.

8. In the event the option is exercised and the sale consummated, the Seller agrees to take from the Purchaser and the Purchaser agrees to extend to the Seller a lease covering the third floor of the office portion of the building for a period of ten (10) years at a rental of $400.00 per month, with a further option for an additional ten (10) year period. All other leases now in force and effect shall be transferred at the time of the sale to the Purchaser.

The parties hereto agree that this document sets forth only the basic agreement and that both parties will execute a formal sales agreement when it is prepared by their attorneys.

Yours very truly,

Blumenfeld Enterprises, Inc.
/s/ By A. Blumenfeld

AB:lrz [In longhand]: Check received
Accepted: 4/24/50
/s/ By Harry Morofsky, Purchaser
/s/ By Harry Morofsky, Lessee

Witness: /s/ M. L. Rose.

EXHIBIT 5-E

AGREEMENT

This Agreement, made and entered into in the City and County of San Francisco, State of California, on the 23rd day of February, 1951, by and between Blumenfeld Enterprises, Inc., a corporation duly organized and existing under and by virtue of the laws of the State of California, herein called the "Seller", and Harry Morofsky, of San Francisco, California, herein called the "Buyer",

Witnesseth:

Whereas, on October 6, 1949, the parties hereto made and executed a written Lease wherein and whereby Seller leased to Buyer certain portions of the Tivoli Theatre Building, commonly known and designated as No. 70 Eddy Street, San Francisco, California, which demised premises are more particularly described in said Indenture of Lease; and

Whereas, on April 24, 1950, the Seller in writing agreed to give Buyer an option for the purchase of the entire Tivoli Theatre Building upon certain terms and conditions set forth in said writing; and

Whereas, the parties hereto did in said writing of April 24, 1950, agree to reduce their agreement to a formal document prepared by their respective attorneys; and

Whereas, the parties hereto now desire to execute said formal agreement setting forth all of the terms of their said agreement;

Exhibit 5-E—(Continued)

Now, Therefore, It Is Hereby Mutually Agreed as follows:

1. In consideration of the sum of Twenty-Five Thousand ($25,000.00) Dollars paid by Buyer to the Seller, the receipt of which was acknowledged on May 1, 1950, and provided as a condition precedent that the Buyer fully performs all the terms, covenants and conditions of the aforementioned Lease of October 6, 1949 at the times and in the manner therein required and prior to the exercise of the within option,

(a) Seller hereby gives to Buyer the exclusive right to buy, on or before October 1, 1951, at 12:00 o'clock noon, standard time, all that certain land and building in the City and County of San Francisco, State of California, generally known and designated as the entire Tivoli Theatre Building, No. 70 Eddy Street, San Francisco, California, and more particularly described as follows:

Beginning at a point on the northerly line of Eddy Street, distant thereon 68 feet and 9 inches easterly from the easterly line of Mason Street; running thence easterly along said line of Eddy Street 68 feet and 9 inches; thence at a right angle northerly 89 feet and 6 inches; thence at a right angle easterly 75 feet to the westerly line of Glasgow Street; thence at a right angle northerly along said line of Glasgow Street 96 feet; thence at a right angle westerly 75 feet; thence at a right angle southerly 10 feet and 6 inches; thence at a right angle westerly 68 feet and 9 inches; and thence at

Exhibit 5-E—(Continued)

a right angle southerly 175 feet to the point of beginning.

Being part of 50 Vara Block No. 171.

(b) Seller agrees to convey to the Buyer a merchantible title to said real property, free and clear of all liens and encumbrances, except those liens and encumbrances hereinafter specifically named and mentioned.

(c) Seller agrees to assign and deliver to the Buyer by proper instruments of assignment the following leases:

1. Morofsky lease.
2. Variety Club lease.
3. Bar lease.

All deposits on each of said leases as security or otherwise, including but not limited to the deposit of Twenty Five Thousand ($25,000.00) Dollars on the Morofsky lease, shall be credited by the Seller to the Buyer on account of the purchase price of said real property as herein set forth.

2. That the purchase price of said land and building above described shall be the sum of Three Hundred Thirty Five Thousand, Six Hundred Twenty Two ($335,622) Dollars, which sum shall be paid to the Seller as follows:

(a) The Buyer agrees to assume and pay the balance to become due, not exceeding Fifty Thousand ($50,000.00) Dollars, on a certain Promissory Note made by the Seller to Bank of America National Trust and Savings Association, dated February 25, 1946, in the principal sum of One Hundred Twenty

Exhibit 5-E—(Continued)

Thousand ($120,000.00) Dollars, which said Promissory Note is secured by a Deed of Trust of even date with said Promissory Note on said real property made by the Seller to Corporation of America, a corporation, as trustee for Bank of America National Trust and Savings Association, recorded March 9, 1946, in Liber 4426 of Official Records at Page 239, in the office of the County Recorder of the City and County of San Francisco, State of California. The Seller represents and warrants to the Buyer that said Promissory Note is payable to said Bank of America National Trust and Savings Association in installments of One Thousand Five Hundred Fifty-Four and 54/100 ($1,554.54) Dollars monthly, including interest, and that the balance due on said Promissory Note as of December 31, 1950, was the sum of Forty-Nine Thousand Nine Hundred Forty and 51/100 ($49,940.51) Dollars. The Seller agrees that the amount due under the terms of said Promissory Note at the time of the exercise of this option shall not exceed the sum of Fifty Thousand ($50,000.00) Dollars.

(b) The Buyer shall receive credit on account of the purchase price of said real property for all deposits made by the lessees on the leases specified in paragraph 1(c) above set forth, including but not limited to the deposit of Twenty Five Thousand ($25,000.00) Dollars made under the Morofsky lease, the receipt of which was heretofore acknowledged on May 1, 1950.

(c) Within the time specified for closing, herein-

Exhibit 5-E—(Continued)

after stated, the Buyer shall pay the Seller the following sums, for which the Buyer shall be given credit on the balance of the purchase price:

(i.) A sum of money equal to the difference between the sum of Fifty Thousand ($50,000.00) Dollars and the amount of money unpaid from the Seller to the Bank of America National Trust and Savings Association at the time of the consummation of the sale on the Promissory Note specified in paragraph 2(a) hereof.

(ii.) The sum of Thirty Nine Thousand ($39,000.00) Dollars.

(d) The balance of the purchase price, namely, the difference between the purchase price of Three Hundred Thirty Five Thousand Six Hundred Twenty Two ($335,622.00) Dollars and the various sums of money for which the Buyer shall be given credit thereon, as herein specified, shall be evidenced by a Promissory Note secured by a second Deed of Trust on the real property hereinabove described, which said Deed of Trust shall be junior only to the first Deed of Trust referred to in subdivision (a) of this paragraph 2 of this agreement. Said Promissory Note secured by said second Deed of Trust shall bear interest at the rate of four and one-half (4½%) per cent per annum on the principal amount and decreasing balances thereof. The principal amount of said Promissory Note shall be payable to the Seller in installments of Three Thousand Five Hundred ($3,500.00) Dollars monthly, plus interest, commencing one month after the con-

Exhibit 5-E—(Continued)

summation of said sale for twelve (12) successive months; thereafter, in installments of Five Thousand ($5,000.00) Dollars monthly, plus interest at the same rate until said Promissory Note shall be fully paid, or until the encumbrances against said real property are refinanced as hereinafter stated.

Said Promissory Note and said second Deed of Trust shall be on a standard form generally used by title insurance companies in the City and County of San Francisco, State of California, and approved in writing by the Seller.

3. This option to purchase shall be exercised by Harry Morofsky, as Buyer, by serving upon the Seller, either personally or by registered United States mail, postage prepaid, a written notice of the Buyer's election to exercise said option to purchase said real property and building. When the option to purchase is exercised, all obligations of the purchaser, as stated herein, and all papers in connection therewith, shall be signed by Herman Hertz, as an individual, or by Hertz Shoe Clinic, Inc., a California corporation, in the place and stead of said Harry Morofsky. The Buyer shall have the option and right to determine whether the title to said real property shall be taken in the name of Herman Hertz or in the name of Hertz Shoe Clinic, Inc.

4. In the event the Buyer exercises the option to purchase herein granted, within the time limit herein provided, the owner (either said Herman Hertz or said Hertz Shoe Clinic, Inc.) shall make, sign, execute, acknowledge and deliver a certain Inden-

Exhibit 5-E—(Continued)

ture of Lease concurrently therewith and as a part of the consummation of said sale and purchase, wherein there shall be leased to the Seller the third floor of the office portion of the building situate on the property hereinabove described for a period of ten (10) years at a rental of Four Hundred ($400.00) Dollars per month, with an option to the Seller, as the Lessee of said office space, to extend the term of said Lease for an additional ten (10) year period thereafter, upon the same terms, covenants and conditions of said Lease, except that the rental during said extended term shall be subject to arbitration, but in no event less than Four Hundred ($400.00) Dollars monthly rental and, provided further, that during said extended term the Lessor named in said Lease shall have the right and option to cancel said Lease in case of a desire of the Lessor to demolish said building, or if the building is sold for use for other than office purposes, said option to cancel to be exercisable upon six (6) months previous written notice of cancellation. The said Lease shall become effective on the first day of the month immediately succeeding the month in which the sale of the within described property is consummated, and until said Lease becomes effective, the Seller shall not be liable to the Buyer, except as otherwise provided in this agreement, for the payment of any rent on account of its occupancy of the third floor space heretofore mentioned.

Said Lease shall be in the form annexed hereto marked "Exhibit A" and made a part hereof and

Exhibit 5-E—(Continued)

which has been initialed for identification by the respective parties hereto.

5. Prior to the commencement of any building development on the demised premises and as long as the Seller is the holder of a second deed of trust, the Buyer shall furnish the Seller with plans and specifications showing the proposed improvement and secure the Seller's written assent thereto. It is agreed, however, that anything herein or in said Lease dated October 6, 1949 to the contrary notwithstanding, the Buyer shall immediately hereafter clear that portion of the real property formerly occupied by the Tivoli Theatre, a diagram of which area is annexed hereto and marked Exhibit B and by such reference made a part hereof, and the Buyer may use the said premises and area for parking lot facilities by erecting a ramp for ingress and egress therefrom through the old entrance to the said Tivoli Theatre and such other ramps as the Buyer may deem necessary.

6. The parties shall have sixty (60) days from and after the exercise of the within option by the Buyer to pay all sums and to deliver documents necessary to complete said sale of real property. All sums and documents shall be delivered by the Buyer and the Seller respectively to the California Pacific Title Insurance Company at its office in the City and County of San Francisco, State of California, or other title insurance company to be selected by the Seller, as escrow holder, and said transaction shall be consummated within said time limit.

Exhibit 5-E—(Continued)

Buyer shall pay all costs of title insurance policies and escrow charges and all other charges in connection therewith, except that Seller shall pay for the documentary stamps required to be affixed to the Deed transferring title to the real property hereinabove described from Seller to Buyer. All taxes, insurance and rental shall be pro rated between the parties as of the date of the recordation of the Deed.

7. (a) Ten (10) days from the date of the exercise of the within option by the Buyer are allowed to the said Buyer to examine title to said property and report in writing any valid objection thereto to the Seller at its office at No. 70 Eddy Street, San Francisco, California. If no such written objection to title is so reported, then within sixty (60) days after the exercise of the within option by the Buyer, all sums and documents necessary to complete said sale of real property and lease of office space shall be delivered by the Buyer and the Seller respectively to the escrow holder heretofore named, and said transaction shall be consummated within said time limit.

(b) If any such objection to said title is reported, the Seller shall use all due diligence to remove it within ninety (90) days thereafter, and if so removed, then within five (5) days after said objection has been removed, all sums and documents necessary to complete said sale of real property and lease of office space shall be delivered by the Buyer and the Seller respectively to the escrow holder here-

Exhibit 5-E—(Continued)

tofore named and said transaction shall be consummated within the time limit hereinabove set forth, save and except as extended by the provisions of this sub-paragraph (b).

(c) If such objection cannot be removed within the time allowed, the Buyer's obligation to complete said purchase of real property may, at the election of the Buyer, terminate and end, and this Agreement shall continue in full force and effect to the extent herein elsewhere provided as though the Buyer had not exercised the within option to purchase, unless the Buyer elects to purchase said property upon all of the foregoing terms, covenants and conditions but subject to said defects and objections.

(d) If the Buyer elects to purchase said real property upon all of the foregoing terms, covenants and conditions, but subject to said defects and objections, he shall notify the Seller of said election in writing within said ninety (90) day period allowed to the Seller to remove said objection and within five (5) days after the giving of said notice of election, all sums and documents necessary to complete said sale of real property and lease of office space shall be delivered by the Buyer and the Seller respectively to the escrow holder heretofore named, and said transaction shall be completed within the time limit hereinabove set forth except as extended by the provisions of this sub-paragraph (d).

8. If after the exercise of said option, the Buyer

Exhibit 5-E—(Continued)

shall fail to comply with any of the terms, covenants or conditions at the time or in the manner provided in this Agreement, or in the event that the Buyer does not exercise the within option to purchase within the time limit herein provided, or consummate the sale within the time limit hereinabove set forth, the Seller shall be released from any and all obligation to sell said real property hereunder. The said deposit of Twenty-Five Thousand ($25,000.00) Dollars referred to hereinabove in paragraph 1 hereof shall be retained by the Seller as additional collateral security to guaranty the Buyer's faithful performance of all of the terms, covenants and conditions of said Lease dated October 6, 1949, and for the payment of any and all sums for which the Buyer may be or become liable hereunder. Seller is hereby granted the irrevocable right, but is not required, to use and pay but at its option all or any part of said security without prior notice to Buyer for the purpose of performing any duties or paying any sums that the Buyer is required to perform or pay under the terms of said Lease and concerning the performance and payment of which the Buyer is in default. To the extent that said security is not used or paid out the Buyer shall receive credit therefor against rent falling due at the end of the term of said Lease. Said security shall bear no interest.

9. Buyer and Seller hereby ratify and confirm all of the covenants, terms and conditions of said Indenture of Lease dated October 6, 1949, except

Exhibit 5-E—(Continued)

insofar as the same may have been modified or altered by any of the terms, covenants and conditions of this Agreement, and notwithstanding each and every of the terms, covenants and conditions herein set forth the Seller hereby expressly reserves and retains the guaranty by Herman Hertz of Lessee's (the Buyer's) performance under the terms of said Lease.

10. Neither this Agreement nor any right, title or interest of the Buyer created hereunder shall be assigned, mortgaged, pledged or hypothecated by the Buyer to any person, firm or corporation except Herman Hertz or Hertz Shoe Clinic, Inc., a California corporation, without the prior written consent of the Seller. The Seller does hereby give its consent to the assignment of this Agreement to said Herman Hertz or said Hertz Shoe Clinic, Inc.

11. If, after said real property and building shall have been purchased pursuant to the provisions hereof, the owner thereof shall desire to refinance the existing encumbrances against said real property, the Seller agrees to permit the same by removing from record the Deed of Trust mentioned in paragraph 2(a) of this Agreement and by cancelling the Promissory Note for which said Deed of Trust is the security, and by accepting from such owner contemporaneously another Promissory Note (as hereinafter set forth) executed by the owner to the Seller secured by another Deed of Trust which shall be junior only to a first Deed of Trust here-

Exhibit 5-E—(Continued)

after to be executed by the owner, subject to the following conditions:

(a) That the Deed of Trust constituting the first encumbrance against said real property shall not be in a sum greater than Three Hundred Twenty-Five Thousand ($325,000.00) Dollars, without the consent of the Seller.

(b) That the moneys realized from such refinancing shall be used by the owner

(i.) First, to pay in full any moneys remaining due on the Promissory Note secured by the Deed of Trust specified in paragraph 2(a) hereof;

(ii.) Second, to reduce the amount of the secured obligation of the owner to the Seller as specified in paragraph 2(e) and the introduction to this paragraph 11 hereof to the sum of One Hundred Twenty-Five Thousand ($125,000.00) Dollars;

(iii.) Third, to further reduce the obligation of the owner to the Seller in an amount of money which the owner would have been required to pay the Seller, had the total obligation of the owner to the Seller been One Hundred Twenty-Five Thousand ($125,000.00) Dollars on October 1, 1951, and which would have been reduced thereafter at the rate of One Thousand Two Hundred Fifty ($1,250.00) Dollars monthly; that is to say, the owner shall pay the Seller in further reduction of said obligation, at the time of refinancing, One Thousand Two Hundred Fifty ($1,250.00) Dollars for each month which has elapsed after October 1, 1951 to the date of refinancing.

Exhibit 5-E—(Continued)

(iv.) Fourth, to finance the erection of a structure on said real property.

(v.) Fifth, to apply any excess sums remaining after the moneys obtained from refinancing have been fully paid as set forth in sub-paragraphs i, ii, iii and iv hereof, to further reduce the obligation of the owner to the Seller, which said excess shall be paid to the Seller as indicated, in further reduction of the Promissory Note specified in paragraph 11(e) hereof.

(c) Upon refinancing and prior to the commencement of any building development on the real property, the owner shall furnish the Seller with plans and specifications showing the proposed improvements to be made, and secure the Seller's written assent thereto, and such improvements shall be commenced by the owner within six (6) months from the date of such refinancing. The Buyer shall submit said plans and specifications to the Seller for approval within 90 days after the completion of such refinancing; the Seller shall have 30 days thereafter to approve or disapprove, in writing, said plans and specifications. If the Seller does not approve the same within the time specified, the plans and specifications shall be deemed to have been approved by the Seller. If the same are disapproved by the Seller, within said time, the Buyer shall have sixty (60) days after such disapproval within which to submit revised plans and specifications and within which to commence the proposed improvements,

Exhibit 5-E—(Continued)

which said revised plans and specifications shall likewise be subject to the written approval or disapproval by the Seller within thirty (30) days thereafter. After refinancing and disbursements of funds as provided from said refinancing in this paragraph and if construction of the proposed improvements be not commenced within the six month time limit set forth herein, then all funds in the escrow shall be paid to the seller for application to a pro tanto reduction in the obligation of the owner under the aforementioned second deed of trust.

(d) Any moneys realized by refinancing shall be escrowed in writing, either with the financial institution or person lending the money for such refinancing, or with an escrow company to be selected by the Seller, and all disbursements made therefrom shall be used to pay the obligations, or to defray the costs and expenses enumerated in subparagraphs i, ii, iii, iv and v of this paragraph 11 of this Agreement, in the order set forth, and all disbursements from said escrow shall be subject to the written approval of the Seller.

(e) Upon such refinancing, as herein set forth, the balance of the obligation of the owner to the Seller shall be evidenced by a Promissory Note of the owner to the Seller secured by a second Deed of Trust on the real property hereinabove described, which said Deed of Trust shall be junior only to the Deed of Trust constituting the first encumbrance thereon. Said Promissory Note and said second Deed of Trust shall be on a standard form generally

Exhibit 5-E—(Continued)

used by title insurance companies in the City and County of San Francisco, State of California, and approved in writing by the Seller. Said Promissory Note shall be payable by the owner to the Seller in monthly installments of One Thousand Two Hundred Fifty ($1,250.00) Dollars, or more, plus interest at the rate of four and one-half (4½%) per cent per annum, until the obligation of the owner to the Seller is fully paid.

12. The time for the exercise of said option and for the performance of any and all acts and duties on the part of the Buyer and the Seller to be performed under the terms hereof shall be of the essence of this Agreement.

In Witness Whereof, we have hereunto set our hands and seals the date and year first above written.

Blumenfeld Enterprises, Inc.,
a corporation,

/s/ By Joseph Blumenfeld, President,

/s/ By A. Blumenfeld, Secretary,
Seller

/s/ Harry Morofsky, Buyer

The above Agreement shall not affect my guaranty of that certain Lease dated October 6, 1949, mentioned in said Agreement. I further agree to execute the documents specified in the foregoing instrument when and when said option to purchase is exercised.

/s/ Herman Hertz

Exhibit 5-E—(Continued)

EXHIBIT A

INDENTURE OF LEASE

This Lease made this....day of....., 1951, between.....and Joseph Blumenfeld, hereinafter called respectively Lessor and Lessee, without regard to number or gender,

Witnesseth:

That Lessor hereby leases unto Lessee, and Lessee hereby hires from Lessor, those certain premises known as the Third Floor of that certain building commonly known and designated as No. 70 Eddy Street, in the City and County of San Francisco, State of California.

Said premises shall be used as offices for no other business or purpose without the written consent of Lessor.

The term shall be for ten (10) years commencing on the....day of....., 19.., at the monthly rental of Four Hundred ($400.00) Dollars, payable in advance on the first day of each and every month. The Lessor hereby gives and grants to the Lessee the privilege of renewing this Lease upon the same terms, covenants and conditions as herein expressed for an extended period of ten (10) years from and after the expiration of the original term hereof, except that during the extended term the rental shall be subject to arbitration, but in no event less than Four Hundred ($400.00) Dollars

Exhibit 5-E—(Continued)

used by title insurance companies in the City and County of San Francisco, State of California, and approved in writing by the Seller. Said Promissory Note shall be payable by the owner to the Seller in monthly installments of One Thousand Two Hundred Fifty ($1,250.00) Dollars, or more, plus interest at the rate of four and one-half (4½%) per cent per annum, until the obligation of the owner to the Seller is fully paid.

12. The time for the exercise of said option and for the performance of any and all acts and duties on the part of the Buyer and the Seller to be performed under the terms hereof shall be of the essence of this Agreement.

In Witness Whereof, we have hereunto set our hands and seals the date and place first above written.

Blumenfeld Enterprises, Inc.,
a corporation,

/s/ By Joseph Blumenfeld, President,

/s/ By A. Blumenfeld, Secretary,
Seller

/s/ Harry Morofsky, Buyer

The above Agreement shall not alter my guaranty of that certain Lease dated October 6, 1949, mentioned in said Agreement. I further agree to execute the documents specified in the foregoing instrument if and when said option to purchase is exercised.

/s/ Herman Hertz

Exhibit 5-E—(Continued)

EXHIBIT A

INDENTURE OF LEASE

This Lease made this....day of....., 1951, between.....and Joseph Blumenfeld, hereinafter called respectively Lessor and Lessee, without regard to number or gender,

Witnesseth:

That Lessor hereby leases unto Lessee, and Lessee hereby hires from Lessor, those certain premises known as the Third Floor of that certain building commonly known and designated as No. 70 Eddy Street, in the City and County of San Francisco, State of California.

Said premises shall be used as offices for no other business or purpose without the written consent of Lessor.

The term shall be for ten (10) years commencing on the....day of....., 19.., at the monthly rental of Four Hundred ($400.00) Dollars, payable in advance on the first day of each and every month. The Lessor hereby gives and grants to the Lessee the privilege of renewing this Lease upon the same terms, covenants and conditions as herein expressed for an extended period of ten (10) years from and after the expiration of the original term hereof, except that during the extended term the rental shall be subject to arbitration, but in no event less than Four Hundred ($400.00) Dollars

Exhibit 5-E—(Continued)

monthly, and that during said extended period the Lessor shall have the option and right to cancel said Lease in case of demolition of the building or if the same is sold for use for other than its present purposes, by giving the Lessee at least six (6) months previous written notice of its intention to cancel said Lease. The option to extend the original term as specified above shall be exercised by the Lessee by giving the Lessor at least six (6) months written notice thereof prior to the end of the original term.

It is further mutually agreed between the parties as follows:

1. Lessee shall not use or permit said premises or any part thereof to be used for any purpose or purposes other than the purpose or purposes for which said premises are hereby leased; and no use shall be made or permitted to be made of the said premises nor acts done which will increase the existing rate of insurance upon the building in which said premises are located, or cause a cancellation of any insurance policy covering said building or any part thereof, nor shall Lessee sell or permit to be kept, used or sold in or about said premises any article which may be prohibited by the standard form of fire insurance policies.

2. Lessee shall not commit or suffer to be committed any waste upon said premises nor any public or private nuisance or other act or thing which may disturb the quiet enjoyment of any other tenant

Exhibit 5-E—(Continued)

in the building in which the demised premises are located, nor without limiting the generality of the foregoing, shall Lessee allow said premises to be used for any improper, immoral, unlawful or objectionable purpose, nor for the keeping, storing or selling of intoxicating liquors, nor for any kind of eating house or for sleeping purposes, nor for washing clothes or cooking therein, and nothing shall be prepared, manufactured or mixed in said premises which might emit an odor in the corridors of said building, nor shall Lessee use any apparatus, machinery or device in or about the demised premises which shall make any unreasonable noise or set up any vibration or which shall in any way unreasonably increase the amount of electricity, or water agreed to be furnished or supplied under this Lease.

3. Lessee shall, at his sole cost and expense, comply only with such requirements of all Municipal, State and Federal authorities now in force as shall pertain exclusively to the Third Floor of the building hereinbefore referred to, but in this respect it is mutually understood and agreed that the Lessee shall not be required, at his expense, to comply with the requirements of any Municipal, State or Federal authorities now or hereafter in force relating to the said premises insofar as the said leased premises are an integral part of the building in which the said leased premises are located, and in this respect it is agreed that the Lessor shall, at his sole cost and expense, comply with all requirements of all Municipal, State and Federal authorities now or

Exhibit 5-E—(Continued)

hereafter in force relating to the building of which the leased premises are a part, including the premises themselves, and the Lessor agrees faithfully to provide to the Lessee all facilities and utilities in compliance with all requirements of Municipal, State and Federal authorities now or hereafter in full force and effect.

4. Lessee agrees that the premises are now in tenantable and good condition, and the Lessee further agrees that he will take care of the interior of the premises leased hereunder, provided, however, that the Lessor agrees that he will take care of and maintain the walls, fire escapes, the roof and the structural members of the building in which the leased premises are located insofar as the said walls, fire escapes, roof and structural members relate to and are essential to the use and occupancy of the leased premises by the Lessee, it being further understood that the Lessee waives all rights to make repairs at the Lessor's expense under the provisions of Section 1942 of the Civil Code of the State of California, but said Lessee reserves the right to alter and/or re-arrange the interior partition and walls of the leased premises from time to time at his sole expense in order that they may be conformed to Lessee's requirements for the use of the leased premises as they may vary from time to time.

5. Lessee agrees that at the termination of this Lease or the extended term thereof, Lessee shall surrender said premises to the Lessor in as good

Exhibit 5-E—(Continued)

condition and repair as reasonable and proper use thereof will permit.

6. Lessee as a material part of the consideration to be rendered to Lessor under this Lease hereby waives all claims against Lessor for damages to goods, wares and merchandise in, upon or about said premises and for injuries to persons in or upon or about said premises from any cause arising at any time, except for the negligence of Lessor or his failure to comply with any of the terms, covenants and conditions of this Lease, provided, however, that this waiver and agreement on the part of the Lessee shall relate only to the use and occupancy of the leased premises hereinbefore referred to.

7. Lessee shall permit Lessor and his agents to enter in and upon said premises at all reasonable times for the purpose of inspecting the same and for the purpose of maintaining the building in which the premises are situated and for the purpose of making repairs, alterations and additions to any other portions of the building, as the Lessor may desire.

8. Lessor agrees to furnish the demised premises with water, heat, electricity, automatic elevator service, including elevator maintenance service, janitorial service for the entrance to the building and the glass doors of the entrance. Lessor, however, shall not be liable for failure to furnish any of the foregoing when such failure is caused by con-

Exhibit 5-E—(Continued)

ditions beyond the control of Lessor, or by accidents, repairs or strikes.

9. In the event of a partial destruction of said premises during said term or the extended term thereof, from any cause, Lessor shall forthwith repair the same, provided that such repairs can be made within ninety (90) working days under the laws and regulations of State, County, Federal or Municipal authorities, but such partial destruction shall in no wise annul or void this Lease, except that Lessee shall be entitled to a proportionate reduction of rent while such repairs are being made; such proportionate reduction to be based upon the extent to which the making of such repairs shall interfere with the business carried on by Lessee in said premises. If such repairs cannot be made within ninety (90) working days, or such repairs cannot be made under said laws and regulations, this Lease may be terminated at the option of either party.

10. Lessee shall not assign nor mortgage this Lease or any right hereunder nor sublet the premises nor any part there of without the prior written consent of the Lessor. No consent to any assignment of this Lease nor any subletting of said premises shall constitute a waiver or discharge of the provisions of this paragraph except as to the specific instance covered thereby; nor shall this Lease nor any interest therein be assignable by operation of law, including bankruptcy, whether voluntary or involuntary, or any other State or Federal law relat-

Exhibit 5-E—(Continued)

ing to debtors, and no trustee, sheriff, creditor, or purchaser to any judicial sale or any officer of any Court or receiver shall acquire any right under this Lease or to the possession or use of the premises or any part thereof without the prior written consent of Lessor. Lessor does hereby give its written consent to the assignment of this Lease to Abe Blumenfeld and/or Blumenfeld Enterprises, Inc. or to any corporation under the operation and/or control of Joseph Blumenfeld and/or Abe Blumenfeld, provided, however, that such corporation will actually occupy the demised premises for corporate purposes.

11. In the event of any breach of this Lease by Lessee, then Lessor, besides other rights or remedies he may have, shall have the immediate right of reentry and may remove all persons and property from the premises. Should Lessor elect to re-enter as herein provided or should he take possession pursuant to legal proceedings or pursuant to any notice provided by law, he may either terminate this Lease or may, from time to time, without terminating this Lease, relet said premises or any part thereof for such term or terms and at such rental or rentals and upon such other terms and conditions as Lessor, in his sole discretion, may deem advisable, with the right to make alterations or repairs to said premises. Rentals received by Lessor from such reletting shall be applied, first, to the payment of any indebtedness other than rent due hereunder from

Exhibit 5-E—(Continued)

Lessee to Lessor; second, to the payment of rent due and unpaid hereunder; and third, to the payment of any cost of such reletting, and the residue, if any, shall be held by Lessor and applied in the payment of future rent as the same may become due and payable hereunder. Should such rentals received from such reletting during any month be less than agreed to be paid during that month by Lessee hereunder and there be no balance due Lessee hereunder on account of moneys held by Lessor for the payment of future rent, then the Lessee shall pay such deficiency to the Lessor. Such deficiency shall be calculated and paid monthly. No such reentry or taking possession of said premises by Lessor shall be construed as an election on his part to terminate this Lease unless a written notice of such intention be given to Lessee, or unless the termination thereof be decreed by a Court of competent jurisdiction.

12. The voluntary or other surrender of this Lease by Lessee or mutual cancellation thereof shall not work a merger and shall, at the option of Lessor, terminate all or existing sub-leases or sub-tenancies, or may, at the option of Lessor, operate as an assignment to him of all or any of such sub-leases or sub-tenancies.

13. In case of suit by Lessee or Lessor against the other because of the breach of covenant, term or condition in this Lease contained, on the part of Lessee or Lessor to be kept or performed, the pre-

Exhibit 5-E—(Continued)

vailing party shall be paid by the other a reasonable attorney's fee which shall be fixed by the Court.

14. Any notice required or desired to be served by Lessor upon Lessee shall be deemed to have been sufficiently served if the same shall have been left with the Lessee personally at the demised premises or shall have been deposited in the United States Post Office, postage prepaid, registered, and addressed to Lessee at the demised premises, or such other address as the Lessee may, from time to time, designate in writing.

15. The waiver by Lessor or Lessee of any breach of any term, covenant or condition herein contained shall not be deemed to be a waiver of such term, covenant or condition or any subsequent breach of the same or any other term, covenant or condition herein contained. The acceptance or payment of rent hereunder shall not be construed to be a waiver of any breach by Lessee or Lessor of any term, covenant or condition of this Lease.

16. If said Lessee holds possession of the said premises after the term of this Lease or the extended term hereof, such Lessee shall become a tenant from month to month upon the terms herein specified and at a monthly rental of Four Hundred ($400.00) Dollars, payable on the first day of each and every month in advance, and shall continue to be such tenant until such tenancy shall be terminated by Lessor or Lessee by the one giving to the

Exhibit 5-E—(Continued)

other a written notice at least one (1) month prior to the date of termination of such monthly tenancy of his intention to terminate such tenancy.

17. It is understood and agreed that the remedies herein given to Lessor and Lessee shall be cumulative, and the exercise of any one remedy by Lessor or Lessee shall not be to the exclusion of any other remedy.

18. The covenants and conditions herein contained shall apply to and bind the heirs, successors, executors, administrators and assigns of all the parties hereto.

19. Time is of the essence of this Lease.

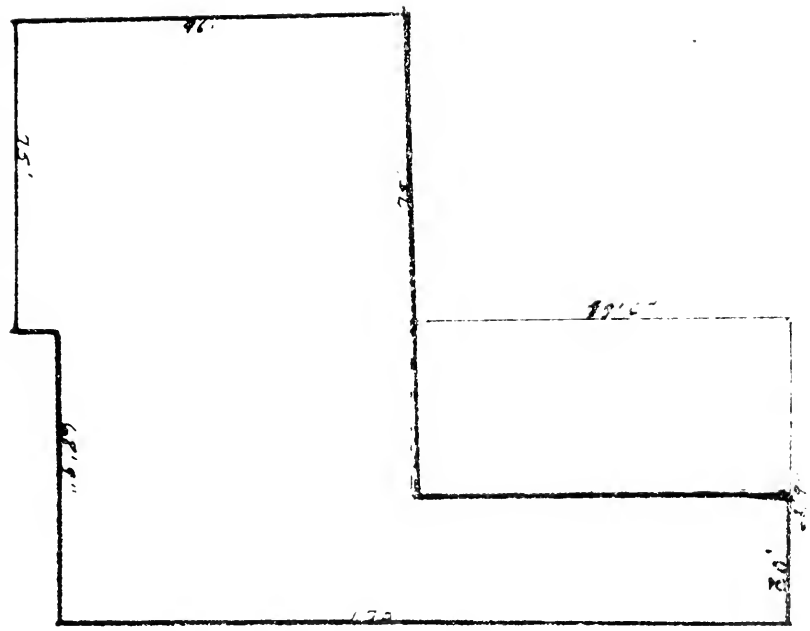
In Witness Whereof, Lessor and Lessee have executed these presents, in duplicate, the day and year first above written.

....., Lessor

/s/ Joseph Blumenfeld, Lessee

[Endorsed]: T.C.U.S. Filed March 16, 1954.

EXHIBIT "B"



[Title of Tax Court and Cause.]

ANSWER TO AMENDED PETITION

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, Daniel A. Taylor, Chief Counsel, Internal Revenue Service, and for answer to the amended petition filed by the above-named petitioner admits, denies and alleges as follows:

1. Admits the allegations contained in paragraph 1 of the amended petition, but denies that the returns were duly filed.

2. Admits the allegations contained in paragraph 2 of the amended petition.

3. Denies the allegations contained in paragraph 3 of the amended petition and alleges that the only amount in controversy is the deficiency in income tax of $31,710.06.

4. Denies the allegations of error contained in subparagraphs 1 to 4, inclusive, of paragraph 4 of the amended petition.

5-(1). Admits that shortly before May 1, 1950 petitioner granted the lessee authority to demolish the building and that on or about May 1, 1950 the lessee caused the said building to be demolished; denies the remaining allegations contained in subparagraph (1) of paragraph 5 of the amended petition.

5-(2). Admits that the petitioner and the Com-

missioner are in agreement as to the rates of depreciation and as to the allocation of the improvements to said property; denies the remaining allegations contained in subparagraph 2 of paragraph 5 of the amended petition.

5-(3). Admits that an application for tentative carry-back adjustment and a claim for refund were filed claiming said refund of $30,803.55 for said year; denies the remaining allegations contained in subparagraph 3 of paragraph 5 of the amended petition.

6. Denies generally and specifically each and every allegation in the amended petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

/s/ DANIEL A. TAYLOR,
Chief Counsel, Internal Revenue Service

Of Counsel:

Melvin L. Sears, Regional Counsel;
T. M. Mather, Asst. Regional Counsel
L. A. Marcussen, Special Attorney, Internal Revenue Service

[Endorsed]: T.C.U.S. Filed March 25, 1954.

[Title of Tax Court and Cause.]

FINDINGS OF FACT AND OPINION

Taxpayer, owner of an old theatre building which could no longer be profitably operated, entered into an agreement on October 6, 1949, for a 25-year lease to begin May 1, 1950, it being contemplated that the lessee would remodel the building for use as a multi-story parking garage. Conditions subsequently imposed by city and county authorities made the conversion economically impossible. Thereafter, on April 24, 1950, petitioner executed an agreement with the lessee looking towards the sale of the property to the lessee at a later time and providing for an option therefor; the agreement also authorized the lessee meanwhile to demolish the building, so that the space might be used for surface parking. The lessor expressly reserved all rights under the original agreement of October 6, 1949. On or about May 1, 1950, at the commencement of the lease, the lessee demolished the building. Subsequently, the lessee exercised the option to purchase the property. At the time of demolition the building had a remaining useful life of less than sixteen years. Held, taxpayer did not sustain a deductible loss by reason of the demolition of the building.

Samuel Taylor, Esq., Walter G. Schwartz, Esq., and Robert Folkoff, C.P.A., for the petitioner.

Leonard A. Marcussen, Esq., for the respondent.

The respondent determined a deficiency in the amount of $31,710.06 in the income tax of petitioner

for its fiscal year ending July 31, 1948. However, the sole question for decision relates to a deduction for an alleged loss sustained during the fiscal year ending July 31, 1950, which is pertinent here only as a result of the carry-back provisions of the law. The reduction is sought by reason of the demolition of a building by petitioner's lessee pursuant to an agreement between them.

Findings of Fact

Some of the facts have been stipulated. The stipulation and the exhibits attached thereto are incorporated herein by this reference.

Petitioner is a California corporation with its principal office in San Francisco. It filed its corporation income tax returns for its fiscal years ended July 31, 1948, 1949 and 1950 with the collector of internal revenue for the first district of California. It keeps its books and files its returns on the accrual basis.

Petitioner owns and operates theatres and other businesses. On or about March 10, 1946, petitioner purchased the fee interest in the so-called Tivoli property in San Francisco, which consisted of two adjacent, but separate, buildings. One of the buildings was known as the Tivoli Theatre Building, and the other as the Tivoli Office Building. The Theatre Building was constructed in 1911. It had once been an opera house and a famous theatrical landmark in San Francisco. When petitioner acquired the property in 1946 that building had a remaining useful life of twenty years. During the period from Feb-

ruary 10, 1946 to March 2, 1946, the Theatre Building was used for legitimate stage performances. From March 30, 1946 to June 2, 1947, it was used for the presentation of motion pictures. By 1947, the district in which the theatre was located was no longer a desirable theatrical district; there were many bars in the area, and it had become a "tenderloin" district. Its location was away from the main theatre and entertainment districts. From June 2, 1947 until October 6, 1949, the theatre was closed except for one three-day period in 1948 when it was rented for an outside theatrical showing. Petitioner had closed the theatre in 1947 because it was losing money on the operation and found it economically impractical to keep it running. Petitioner thereafter had no intention of using the property as a theatre again.

The Tivoli Office Building from the date of its acquisition by petitioner has been used as an office building, and a portion of the ground floor has been occupied by a cocktail lounge and bar.

Shortly prior to October 6, 1949, petitioner had negotiations with representatives of a prospective lessee of the Theatre Building, looking towards the conversion of the building for garage and parking purposes. As a result of these negotiations, petitioner, on October 6, 1949, as lessor, and Harry Morofsky, as lessee, executed a lease of the Theatre Building for a term of twenty-five years and an aggregate rental of $420,000; in addition, the lessee agreed to pay all real estate taxes and charges levied against the property. Although the term of the

lease was to start May 1, 1950, the lessee was allowed to enter immediately for the purpose of beginning the necessary alterations. The specified rental was to be paid at the rate of $1,250 per month for the first ten years, and $1,500 per month for the last fifteen years. The lease specifically limited the use of the property for the purpose of conducting the following business:

A garage and storage and offices for the use of the Lessee in connection with garage operations, or concessions under-let hereunder to be used with office space, as hereinafter provided.

In the lease Morofsky, the lessee, specifically undertook to remodel the building so as to make it suitable for conducting a garage and car storage business with such offices as might be necessary for the conduct of the business. For this purpose petitioner, as lessor, granted the lessee authority to construct as many floors as the lessee might find necessary but the lessee was obligated as a minimum to construct a basement floor and a first and second floor above that.

Under the lease the lessee was required to submit to petitioner for its approval plans for the remodeling of the building. In the latter part of 1949, preliminary and final plans for a five-story garage were prepared by the lessee at an expense of approximately $4,000, and were approved by petitioner. It was anticipated by the lessee that the cost of the remodeling would be between $45,000 and $50,000.

At the time the lease was entered into on October

6, 1949, neither the petitioner nor the lessee had any intention of demolishing the Theatre Building.

In November 1949, the lessee submitted to the proper authorities of the City and County of San Francisco his plans for remodeling the Tivoli Theatre Building so as to convert the building to a five-story parking garage. The city and county authorities declined to approve the plans as submitted and insisted upon costly revisions involving a substantial increase in the thickness of the walls by the addition of concrete, the inclusion of additional supporting members, and changes in the plans for the ramps, all of such a nature as to reduce substantially the amount and convenient usability of floor space for parking purposes and to render it economically unfeasible to use the Theatre Building for the purpose of a parking garage.

The estimated cost of the remodeling, if performed in accordance with the plans required by the City and County of San Francisco, was in excess of $125,000. It was not economically feasible to incur such cost, and the plan for remodeling the Theatre Building for purposes of a parking and storage garage therefore had to be abandoned.

After the defeat of plan for remodeling the building, the lessee consulted another engineer who advised that the Theatre Building be demolished and that the area thus released be used for surface parking.

On April 24, 1950, the lessor and lessee entered into a letter agreement looking towards the purchase of the entire Tivoli property by the lessee, and

providing in any event for permission to the lessee to demolish the Theatre Building. That agreement reads in part as follows:

1. The sale price is to be $350,000.00.

2. The sum of $25,000.00 is to accompany the sale agreement, in consideration for which the Purchaser shall have an option to conclude the deal within one (1) year.

* * * * *

5. In the event the Purchaser does not conclude the purchase of the property within one (1) year, the $25,000.00 mentioned under No. 2 above shall remain with the Seller as additional lease deposit under that certain lease dated the 6th day of October, 1949, between Blumenfeld Enterprises, Inc., as lessors, and Harry Morofsky, as lessee, and shall be deducted from rentals at the end of the lease term. In consideration of this additional lease deposit, the lessors grant to the lessee permission to demolish the rear portion of the premises [Theatre Building] for the purposes conforming to said lease and further provided the lessee shall furnish to the lessor modified plans showing the proposed basement and ground floor development and shall secure from the lessors written permission for said development. All of the cost of demolishing and improving shall be at the lessee's sole cost and expense.

6. The Seller, as the lessor, expressly retains all of their rights under the aforementioned lease dated October 6, 1949, and makes no waiver of any of the conditions of said lease. * * *

7. In the event the Purchaser exercises his option

to purchase within the one (1) year period, then he shall be given credit by the Seller for the net gross profit from the operation of all of the premises in the interim period. The Seller shall deduct from said rentals, taxes, insurance, utility costs and all other legitimate items of expense.

The letter agreement also contained a statement that it sets forth only the "basic agreement" and that both parties would thereafter execute a "formal sales agreement". The $25,000 payment, referred to in paragraph "2" above, was in fact made on May 1, 1950. When the letter agreement of April 24, 1950, was entered into, the lessee had not determined whether he would exercise the option to purchase which was given therein.

The "formal" agreement contemplated by the parties was executed on February 23, 1951. By its terms the time for exercise of the lessee's option was extended to expire on October 1, 1951, and the lessee was expressly required, notwithstanding anything in the lease of October 6, 1949, to the contrary, to clear the portion of the property formerly occupied by the theatre. The lessee was also expressly authorized to use the "premises and area for parking lot purposes by erecting a ramp for ingress and egress therefrom through the old entrance to the Tivoli Theatre." Pursuant to permission granted by the lessor in paragraph "5" of the letter agreement of April 24, 1950, the lessee had already demolished the Theatre Building on or about May 1, 1950, prior to the end of petitioner's fiscal year ended July 31, 1950.

There was at no time any understanding or plan, either by the petitioner or the lessee, to construct a new building on the theatre property, and no building has ever been constructed thereon.

On September 27, 1951, Harry Morofsky exercised the option granted by the agreements of April 24, 1950 and February 23, 1951, to purchase the Tivoli property, and on November 7, 1951, assigned his rights thereunder to the Hertz Shoe Clinic, Inc., a corporation. That corporation is now the owner of the Tivoli property.

Petitioner has claimed in its returns, and respondent has allowed, depreciation on the Tivoli Theatre and Office Buildings on the basis of a remaining life of twenty years from the date of its acquisition of the fee interest therein (March 10, 1946).

In its income tax return for its fiscal year ended July 31, 1950, petitioner claimed as a deduction an abandonment loss on the demolition of the Tivoli Theatre Building in the amount of $154,226.34[1] representing the undepreciated balance of the cost of that building, as shown on petitioner's books, resulting in a net operating loss of $82,818.32 for its fiscal year ended July 31, 1950. Petitioner claimed a net operating loss carry-back of $82,818.32 from its fiscal year ended July 31, 1950, to its fiscal year ended July 31, 1948, and made application for a

[1] This amount was excessive in any event, since it is stipulated that the total unrecovered cost of the Theatre Building and improvements was $132,284.42.

tentative carry-back adjustment under Section 3780 of the Internal Revenue Code of 1939. A tentative allowance was made to petitioner under this section in the amount of $30,803.55.

In his determination of petitioner's deficiency for the fiscal year ended July 31, 1950, respondent has disallowed the deduction claimed upon the demolition of the Tivoli Theatre Building, and in his notice of deficiency to petitioner for its fiscal year ended July 31, 1948, respondent has not allowed the net operating loss deduction claimed by petitioner.

Respondent on or about June 27, 1952, mailed to petitioner by registered mail the notice of deficiency covering its fiscal years ended July 31, 1949 and 1950. Petitioner did not file a petition with this Court for a redetermination of the deficiencies set forth in the notice. Petitioner paid the deficiencies and filed claims for refund.

Opinion

Raum, Judge: The sole question for decision is whether the demolition of the Tivoli theatre building on or about May 1, 1950 resulted in a deductible loss to petitioner. There is no serious dispute between the parties as to the underlying facts.

Petitioner acquired the fee interest in the property in March 1946. The building then had a remaining useful life of twenty years. After an attempt to use the building for the presentation first of legitimate performances and then of motion pictures, petitioner found that it was losing money.

The district in which the property was located had deteriorated, and petitioner in 1947 closed the theatre without any intention of reopening it thereafter. On October 6, 1949, petitioner entered into an agreement in which it undertook to lease the property for a twenty-five year term beginning May 1, 1950 at an aggregate rental of $420,000, payable in specified monthly installments; in addition, the lessee was to pay real estate taxes and other charges levied against the property. The lease agreement contemplated that the lessee would remodel the building for use as a multi-story parking garage. However, the plans for conversion of the building were thereafter found unacceptable by the city and county authorities which insisted upon modifications that were so costly as to require that the entire project be abandoned. The lessee was then advised by an engineer that the building be demolished and the space thus released be used for surface parking.

Such was the unhappy situation in which the lessee found himself in April 1950, prior to commencement of the term of the lease, and it was in the light of that situation that the petitioner and the lessee executed the letter agreement of April 24, 1950. That agreement provided for an option, upon payment of $25,000, to purchase the entire Tivoli property for $350,000, the option to be exercised within a specified time. The agreement also authorized the lessee, upon payment of the $25,000 (which could be applied against the lessee's obligation for rent in the event that the option were not exercised) to demolish the theatre building. Peti-

tioner expressly retained all rights under the lease agreement of October 6, 1949.

It was pursuant to permission thus granted in the letter agreement of April 24, 1950, that the lessee, on or about May 1, 1950 (at the beginning of the term of his twenty-five year lease) demolished the building. Thereafter, he exercised the option to purchase the property. We hold that, in the circumstances of this case, petitioner did not suffer any loss by reason of demolition of the building.

It is of course true that the destruction of a building may result in a deductible loss (cf. Parma Co., 18 B.T.A. 429; Dayton Co. vs. Commissioner, 90 F.2d 767 (C.A. 8)), and Treasury regulations have long recognized that such deduction may be available. Petitioner relies upon such regulations.[2] How-

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[2] Regulations 111, Section 29.23(e)-2:

Voluntary Removal of Buildings.—Loss due to the voluntary removal or demolition of old Buildings, the scrapping of old machinery, equipment, etc., incident to renewals and replacements is deductible from gross income. When a taxpayer buys real estate upon which is located a building, which he proceeds to raze with a view to erecting thereon another building, it will be considered that the taxpayer has sustained no deductible loss by reason of the demolition of the old building, and no deductible expense on account of the cost of such removal, the value of the real estate, exclusive of old improvements, being presumably equal to the purchase price of the land and building plus the cost of removing the useless building.

The first sentence, upon which petitioner relies, is not literally applicable here, because the demolition was not "incident to renewals and replacements".

ever, it has been firmly established that not every destruction of a building results in a deduction, since none is available where the taxpayer has not in fact sustained a loss by reason of the demolition. An example is furnished in the regulations, where one purchases real estate intending to raze an existing structure for the purpose of erecting another building on the site. In such circumstances the purchaser is not regarded as having in fact sustained any loss, and no deduction is allowable. But the situation thus described is not the only one in which the deduction is unavailable. See Commissioner vs. Appleby's Estate, 123 F.2d 700, 702 (C.A. 2). And it has been disallowed in a variety of other circumstances, where no actual loss was suffered as a result of the demolition. Charles N. Manning, 7 B.T.A. 286; William Ward, 7 B.T.A. 1107; Oscar K. Eysenbach, 10 B.T.A. 716; Anahma Realty Corp., 16 B.T.A. 749, affirmed, 42 F.2d 128 (C.A. 2), certiorari denied, 282 U.S. 854; Mary C. Young, 20 B.T.A. 692, affirmed, 59 F.2d 691 (C.A. 9), certiorari denied, 287 U.S. 652; Spinks Realty Co., 21 B.T.A. 674, affirmed, 62 F.2d 860 (App. D.C.); Laurene Walker Berger, 7 T.C. 1339.

We turn then to the facts of this case to inquire whether petitioner in fact sustained a loss by reason of the demolition. It must be kept in mind that when petitioner purchased the property in March 1946, the building had a remaining useful life of twenty years. By May 1, 1950, when the building was demolished, less than sixteen years of useful life remained. Yet, at that time, when the building and

improvements had an unrecovered cost of $132,-284.42, the property was subject to a twenty-five year lease at an aggregate rental of $420,000. And in the agreement of April 24, 1950, authorizing the lessee to demolish the building, petitioner expressly retained all its rights as lessor. The term of the lease extended substantially beyond the remaining useful life of the building, and since the lessee's obligations under the lease were in no way curtailed upon removal of the building, we cannot conclude that petitioner in fact sustained any loss by reason of the demolition. Cf. Albert L. Rowan, 22 T.C. ... (No. 105).

Moreover, there are other factors in this case that preclude the allowance of the claimed deduction. Permission to demolish the theatre building was given to the lessee in the letter agreement of April 24, 1950. That agreement was one that looked primarily towards the sale of the property. Of course, there was no assurance at that time that the sale would go through, but the option was in fact exercised and the sale did in fact take place, as contemplated, although there were modifications in some of the details. In such circumstances the only loss allowable would be one at the time of sale equal to the excess, if any, of the adjusted basis over the sales price. See Oscar K. Eysenbach, 10 B.T.A. 716, 722.

Finally, the deduction must be disallowed for the further reason that the removal of a building in connection with obtaining a lease on the property is regarded as part of the cost of obtaining the lease.

Charles N. Manning, supra; Mary C. Young, supra; Spinks Realty Co., supra; Laurene Walker Berger, supra. To be sure, the demolition of the theatre building was not contemplated at the time of execution of the agreement of October 6, 1949, but, prior to the commencement of the lease (May 1, 1950), it had become abundantly clear that the entire purpose of the lease would be defeated unless the building were demolished. And it was in recognition of this plain fact that the permission to remove the building was granted on April 24, 1950. The provision granting that permission was a modification of the original agreement, and the lease must be regarded as founded on both the October 6, 1949 and April 24, 1950 agreements. Indeed, the razing of the building may well have constituted a benefit rather than a detriment to petitioner. The evidence suggests that the building was obsolete or obsolescent, and the rather substantial cost of demolition was borne by the lessee. Here then was a situation where such a building was removed at the expense of the lessee who was about to begin a long-term lease under terms and conditions that appear to have been highly favorable to the lessor. From the lessor's point of view the building was being replaced by an advantageous lease and therefore no deductible loss is allowable in accordance with the holdings in the cited cases that the unrecovered cost of the razed building is to be treated as part of the cost of the lease.

The facts in this case are unusual, but from whatever point of view the problem is studied, we are

led inevitably to the conclusion that petitioner did not in fact sustain a loss as a result of the destruction of the theatre building, and that to allow the claimed deduction here would be to give petitioner a windfall that Congress never intended.

Decision will be entered under Rule 50.

[Endorsed]: T.C.U.S. Filed January 20, 1955.

The Tax Court of the United States
Washington

Docket No. 39132

BLUMENFELD ENTERPRISES, INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the findings of fact and opinion filed herein January 20, 1955, directing that decision be entered under Rule 50, the parties, on March 11, 1955, filed an agreed computation for entry of decision. It is therefore

Ordered and Decided: That there is a deficiency in income tax for the fiscal year ended July 31, 1948, in the amount of $31,405.31.

[Seal] /s/ ARNOLD RAUM,
Judge

Entered: March 23, 1955.

Served: March 24, 1955.

In the United States Court of Appeals
for the Ninth Circuit

Tax Court Docket No. 39132

[Title of Cause.]

PETITION FOR REVIEW BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

Blumenfeld Enterprises, Inc. respectfully petitions this honorable Court to review the decision of The Tax Court of the United States entered in the above-entitled cause on March 23, 1955, determining a deficiency in income tax for the fiscal year ended July 31, 1948 in the amount of $31,405.31.

I. Jurisdiction

Petitioner is a corporation organized and existing under the laws of the State of California.

Petitioner filed its Federal income tax return for its taxable year ended July 31, 1948 with the Collector of Internal Revenue for the First District of California, which is located within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

Jurisdiction of this Court to review the aforesaid decision of The Tax Court of the United States is founded on Sections 7482 and 7483 of the Internal Revenue Code of 1954.

II. Nature of Controversy

The controversy herein involves the following issue, which was presented to The Tax Court:

1. Whether a loss forming part of petitioner's net operating loss carry-back from its taxable year ended July 31, 1950 to its taxable year ended July 31, 1948 and allowable as a deduction for income tax purposes for its taxable year ended July 31, 1948, was incurred by the petitioner as a result of the demolition during its taxable year ended July 31, 1950 of the Tivoli Theatre property.

Wherefore, the petitioner petitions that the findings of fact and opinion and decision of The Tax Court of the United States in the above-described cause be reviewed by the United States Court of Appeals for the Ninth Circuit; that a transcript of the record be prepared in accordance with the law and the rules of said Court and be transmitted to the Clerk of the said Court of Appeals for filing, and that appropriate action be taken to the end that the errors of The Tax Court may be reviewed and corrected by said Court of Appeals.

Dated: June 13, 1955.

/s/ SAMUEL TAYLOR,

/s/ WALTER G. SCHWARTZ,
Counsel for Petitioner

Duly Verified.

[Endorsed]: T.C.U.S. Filed June 15, 1955.

The Tax Court of the United States
Washington

[Title of Cause.]

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 35, inclusive, constitute and are all of the original papers and proceedings called for by the Designation of Contents of Record on Review [excepting the original exhibits, which are separately certified and forwarded herewith, being Joint 1-A to 5-E, inclusive, attached to the stipulation of facts, Petitioner's 6 to 12, inclusive, and Respondent's G and H (F and I were marked for identification only and not left with record)], on file in my office in the above proceeding, and in which the petitioner in The Tax Court proceeding has initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceedings, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 12th day of July, 1955.

/s/ VICTOR S. MERSCH,
Clerk, The Tax Court of the
United States

The Tax Court of the United States

Docket No. 39,132

BLUMENFELD ENTERPRISES, INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PARTIAL TRANSCRIPT OF PROCEEDINGS

Room 421, Appraisers Building, 630 Sansome St., San Francisco, California, Tuesday, March 16, 1954—10:00 a.m.

(Met, pursuant to notice.)

Before: Honorable Arnold Raum, Judge.

Appearances: Samuel Taylor, Esq., Walter G. Schwartz, Esq., and Robert O. Folkoff, Esq., 1308 Balfour Bldg., San Francisco, Calif., appearing for the Petitioner. Leonard Allen Marcussen, Esq., (Honorable Daniel A. Taylor, Chief Counsel, Bureau of Internal Revenue), appearing on behalf of the Respondent. [1*] * * * * *

Whereupon,

ABE BLUMENFELD

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name and address.

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* Page numbers appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Abe Blumenfeld.)

The Witness: Abe Blumenfeld; my residence is in Marin County, San Rafael. My business address is 70 Eddy Street, San Francisco.

Direct Examination

Q. (By Mr. Taylor): Mr. Blumenfeld, are you an officer of Blumenfeld Enterprises, Inc., the taxpayer herein?

A. I am a director and secretary of that corporation.

Q. When was it incorporated?

A. It was incorporated on June 18, 1945. These are dates I picked off my books because I wanted to be accurate.

Mr. Marcussen: I have no objection to that.

The Witness: They are just memos of dates.

Q. (By Mr. Taylor): Will you state what the business of Blumenfeld Enterprises, Inc., is? [15]

A. It is a corporation which owns and operates theatres and other businesses.

Q. And has that been true from the date of its incorporation down to the date of this trial?

A. It is.

Q. Will you state whether you were the officer of Blumenfeld Enterprises, Inc. who had charge of the negotiations for the lease of October 6, 1949, between Blumenfeld Enterprises, Inc. and Harry Marofsky Exhibit 3-c to the stipulation?

A. Yes.

Q. Will you describe what the Tivoli property is?

(Testimony of Abe Blumenfeld.)

A. The Tivoli property consists of, or consisted at the time the lease was entered into, of a parcel of ground at 70 Eddy Street, upon which stood two adjacent but separate buildings.

The building facing on Eddy Street was an office building, and at the rear portion of the property was a theatre building, a very small portion of which was attached to the front building by a common party wall. The entrance to the theatre portion was on the ground floor of the office building.

Q. The two were separate and independent buildings, were they?

A. Yes; both separate buildings.

Mr. Marcussen: You mean theatre buildings and [16] office buildings?

The Witness: Yes; two distinct buildings.

Q. (By Mr. Taylor): Had the Tivoli Theatre at one time been used as an opera house in San Francisco?

A. Yes, the Tivoli Theatre was a famous landmark in San Francisco in the theatrical world, but had become obsolete because the district had deteriorated around it.

Q. Will you state, if you know, how old the theatre building was?

A. I believe over 50 years. I think it was 40 years, rather. I think it was built in 1911.

Mr. Taylor: I ask that these four pictures be marked for identification, 6, 7, 8 and 9.

(Testimony of Abe Blumenfeld.)

(The documents above referred to were marked Petitioner's Exhibits 6, 7, 8 and 9 for identification.)

Q. (By Mr. Taylor): I show you Exhibits for identification, being pictures, and marked as Petitioner's Exhibits 6, 7, 8 and 9 and ask you to state what these are.

A. These are photographs of the existing office building which faces on Eddy Street, and pictures of the parking lot where the theatre originally stood.

Q. When were these taken?

A. Last week. [17]

The Court: The parking lot pictures are Exhibits 6 and 9 for identification?

The Witness: Yes, sir.

The Court: And what are Exhibits 7 and 8 for identification?

The Witness: Those are the office building, your Honor.

Q. (By Mr. Taylor): Referring to Exhibit 7 for identification, the area under the marquee there, is that where the entrance to the theatre was?

A. Yes; that was formerly the lobby and the foyer of the theatre.

Q. And that has now been torn out and is used for parking? A. That is right.

Q. And the area in Petitioner's Exhibits 9 and 6, that is the area where the theatre building was?

A. That is right.

Q. And is now used as a parking lot?

A. That is correct.

(Testimony of Abe Blumenfeld.)

Q. In Petitioner's Exhibits for identification, 7 and 8, that shows the existing office building, does it? A. That is right.

Q. Who are the tenants of that office building?

A. The third floor of the building is occupied by Blumenfeld Enterprises, Inc.

Q. The Petitioner herein?

A. The Petitioner herein, as its main office. The second floor is occupied by the Variety Club of Northern California; the ground floor, one portion of the ground floor, is occupied by a cocktail lounge and bar and another portion by the entrance to the office building; the other portion is for a parking area.

Q. Cocktail lounge is known as the Silver Dollar? A. It is.

Q. And were these the tenants at the time of the lease of October 6, 1949? A. They were.

Mr. Taylor: I offer Petitioner's Exhibits for identification 6, 7, 8, and 9 into evidence.

Mr. Marcussen: No objection.

The Court: They are admitted.

(The documents referred to were received in evidence as Petitioner's Exhibits 6, 7, 8 and 9.)

The Court: We have had a good deal of discussion about the destruction of this theatre building. I would like to inquire of counsel whether the fact of the destruction and the time thereof is established by the [19] stipulation, and if not whether you intend to produce evidence.

(Testimony of Abe Blumenfeld.)

Mr. Taylor: We intend to have Mr. Blumenfeld testify as to that.

Mr. Marcussen: I think that is all that is material, if your Honor please.

The Court: I was just making an inquiry.

Mr. Taylor: My purpose in introducing these pictures is to give some life to this so you can see just what happened.

Q. (By Mr. Taylor): After Blumenfeld Enterprises, Inc. acquired the theatre property, will you state what it was used for?

A. It was used for the presentation of motion pictures, stage shows and vaudeville shows.

Q. Until about when?

A. Until about 1947 when it was closed because it was economically impractical to keep it running.

Q. Were you losing money on it? A. Yes.

Q. Why?

Mr. Marcussen: Object to the question, if your Honor please, on the ground that it is completely immaterial whether he was losing money on this in 1946.

We have here a demolition loss in 1950. We have stipulated facts showing the execution of the leases and whether or not Petitioner was making money when he was [20] operating it prior to the lease is wholly immaterial to the issues in this case.

The Court: Well, it is background material, I take it?

Mr. Taylor: That is right.

The Court: The question may be answered.

(Testimony of Abe Blumenfeld.)

Mr. Taylor: Will you read the question, please?

(Question read.)

A. Well, the district in which the theatre was located had become not a desirable theatrical district and it had become a tenderloin district. There were innumerable bars and cocktail lounges in the area, and the theatre location was away from the main theatre and entertainment districts.

Furthermore, the buildings had become very obsolete and——

Mr. Marcussen: Object to that; that is the witness's conclusion, and again is not material to any of the issues in this case. I would like to ask counsel whether he proposes to amend the pleadings on the basis of this proof, and if he does, I submit it is not in issue and should all be stricken.

Mr. Taylor: It seems to me this is just background material, just having a bearing on the question of the intent. As we understand the law, it is very significant here just what was the intent of the parties at the time when the lease was entered into and when the intent to tear down this building [21] first arose, and this is all background material to show just how this place happened to be entered into and why there was an agreement to tear down the building after it was found that a multi-storied garage couldn't be constructed.

Your Honor, upon studying the record, may or may not consider it material, but I think it is helpful to show the entire picture.

The Court: This general background material is permissible. I would prefer you ask the witness

(Testimony of Abe Blumenfeld.)

specific questions rather than let him roam at large.

Mr. Marcussen: I would like to be heard. The entire history of the world up to this point is background material to this event, but they don't have any materiality to what happened here, and if the Petitioner has a purpose to amend, it shouldn't be offered.

The Court: If it is not material it won't have any effect at all. Within reasonable limits I will permit counsel to develop what led up to the destruction of this building.

Mr. Taylor: Just a question or two, your Honor, to show the entire picture.

Would you please read the last question?

(Question read.)

Mr. Marcussen: I would like to move to strike the testimony with respect to obsolescence; that is not an issue in this proceeding, and I feel that is not proper background [22] under any manner of interpretation.

The Court: Mr. Taylor, do you want to ask the witness to rephrase his answer in that connection? The Government's objection may be technically accurate if the term "obsolescence" is being understood in a technical sense.

Q. (By Mr. Taylor): Will you state whether, prior to the lease of October 6, 1949—just immediately prior thereto—the theatre building had any usefulness?

Mr. Marcussen: Object to this on the ground it is leading, if your Honor please.

(Testimony of Abe Blumenfeld.)

Mr. Taylor: I am attempting to restate it so as to take out the word that you object to.

Mr. Marcussen: Well, could you stipulate to a motion to strike the word? That is simply the easiest way, and I submit it to your Honor, to strike his testimony that the building became obsolete.

The Court: I think we are wasting a good deal of time on this. I will permit the word "obsolete", or whatever the form of that word was used to stand, and I will understand it to be used in a colloquial rather than a technical sense.

Mr. Taylor: I am somewhat at a loss as to the point of counsel's objection.

I must ask you again to read the last question and answer. [23]

(Question and answer read.)

Mr. Marcussen: Same objection, your Honor. I am not trying to be technical here, but I have had negotiations with counsel, and I have a reason to anticipate difficulties upon the conclusion of this case with respect to the issues involved. I feel that we should try this case strictly on the pleadings and not refer to issues.

The Petitioner is going to contend, I anticipate, that he is entitled to a deduction for the value of the remaining cost of the building upon the execution of the lease for other reasons. That is not an issue here. We are taken by surprise by it.

The Court: It hasn't been raised.

Mr. Taylor: I frankly don't know what counsel is talking about. We stated in the opening state-

(Testimony of Abe Blumenfeld.)

ment what we understood the single issue to be, and I don't know what counsel is fearful of.

The Court: I am going to permit this testimony to continue within reasonable limits, and if the Government is caught by surprise upon any attempt to raise any new issues at a later time, I will hear the Government on it at that time.

At this point the testimony may continue.

Mr. Taylor: Very well. May he answer the last question, your Honor?

The Court: You have had the reporter read the last [24] question back to you several times.

There is no question pending before the witness, as I understand it, at this point.

Mr. Taylor: Very well.

Q. (By Mr. Taylor): Will you state whether, just immediately prior to the execution of the lease of October 6, 1949, the theatre building, Tivoli Theatre building, had any usefulness as a theatre?

A. We didn't feel it had any.

Mr. Marcussen: I have no objection to the witness using this memorandum for his testimony. I do, however, wish to have it understood that Respondent objects to this entire line of inquiry.

Q. (By Mr. Taylor): Will you state what this theatre building was used for from the time that you acquired it—that Blumenfeld Enterprises, Inc., acquired it?

A. During the period from February 10, 1946, through March 2, 1946, it was used for legitimate stage performances.

(Testimony of Abe Blumenfeld.)

Then it was used for the presentation of motion pictures from March 3, 1946, to June 2, 1947, at which time it closed until March 30 of 1948. Then it was leased for three days only from March 31 to April 2, 1948, when it was rented to an outside show.

Then it was closed again and remained closed until October 6, 1949, the date of the lease to Hertz.

Mr. Marcussen: I would like to offer that for identification as Respondent's next in order.

The Clerk: Exhibit 10.

The Court: That is the paper the witness has been using to refresh his recollection.

The Clerk: That should be Exhibit F.

(The document above referred to was marked as Respondent's Exhibit F for identification.)

Mr. Taylor: That is the paper the witness prepared from his records to testify from.

Q. (By Mr. Taylor): Will you state whether, after the theatre was closed the last time in March, 1948, whether Blumenfeld Enterprises, Inc. anticipated using the theatre again?

Mr. Marcussen: Object to the form of the question as leading, if your Honor please.

The Court: Let him complete the question.

Q. (By Mr. Taylor): ——theatre building again as a theatre building.

Mr. Marcussen: Respondent objects on the ground it is leading. The damage is done because the question is asked, but I feel counsel should be admonished not to ask [26] leading questions.

The Court: Well, I don't think that question is objectionable.

(Testimony of Abe Blumenfeld.)

Q. (By Mr. Taylor): Please answer it.

A. We had no intention of using the theatre again as a theatre.

Q. Why?

A. Because it was outmoded and we kept losing money every time we opened it.

Q. Will you state whether Blumenfeld Enterprises, Inc. considered at that time, or prior thereto, or subsequent thereto, changing the theatre building into an office building?

Mr. Marcussen: Same objection.

The Court: Overruled.

Q. (By Mr. Taylor): Answer, please.

A. We had discussed between the officers what we could do with the building, and it was our judgment that it would be much too costly to convert it into anything for our use.

Q. And that was true just prior to the time that the lease of October 6, 1949 was entered into?

A. That is right.

Q. Will you state the circumstances under which you entered into the lease of October 6, 1949, Exhibit 3-c to the [27] stipulation?

A. I was approached by a real estate agent by the name of Rose, who asked if we would consider leasing the premises for garage purposes, and after negotiating through him with the lessee, we entered into a lease for the reconstruction of the building into a five-story garage.

Q. Will you state who you considered as the real lessee here?

(Testimony of Abe Blumenfeld.)

Mr. Marcussen: Object to that, your Honor, on the ground that it is stipulated who the lessee is. I don't know what a real lessee is other than the lessee named in the stipulation.

Mr. Taylor: If the Court please, this lease is entered into in the name of a Mr. Marofsky, who is here in the courtroom. The real lessee, Mr. Marofsky, the evidence will show, was a dummy. The real lessee was Herman Hertz, who is here in the courtroom.

I propose to offer the testimony of Herman Hertz as to his version of the transaction. I think it is necessary for me to show that the man that really is the lessee here is Herman Hertz. He also will testify, else Mr. Hertz' testimony has no significance.

The Court: Of course, it is very common in business transactions to use a straw man.

Mr. Taylor: That is all I mean. [28]

The Court: And perfectly appropriate to bring that out. I think the question might be phrased more aptly.

Mr. Taylor: May I strike the question?

Q. (By Mr. Taylor): In your negotiations did you ever deal with Harry Marofsky?

A. I had no dealings with him.

Q. Did you deal with a Herman Hertz?

A. I did.

Q. Will you state whom Blumenfeld Enterprises, Inc. considered as the real party in interest here?

Mr. Marcussen: Same objection, if your Honor

(Testimony of Abe Blumenfeld.)

please, on the ground that the stipulation in several places refers to Harry Marofsky as the lessee, and at this time to come in and show that somebody else is the real party in interest, I submit, is too late. It is stipulated that this man is the lessee. He is referred to as the lessee.

The Court: I will let counsel ask the witness outright whether the purported lessee was the straw man.

Mr. Marcussen: Same objection.

Q. (By Mr. Taylor): Will you state whether Harry Marofsky was the straw man?

A. He was.

Q. Who was the real lessee? [29]

A. Herman Hertz.

The Court: I am admitting this testimony, however, not for the purpose of contradicting anything in the stipulation, but merely for the purpose of showing the surrounding circumstances involved in the transaction.

Mr. Taylor: If the Court please, we are quite happy with that. We don't intend to, and don't think we are, contradicting anything in the stipulation.

Mr. Marcussen: Respondent's objection is based on the further ground that it represents this witness's conclusion. The witness is competent only to testify as to what negotiations he actually entered into and what was said and done.

I think that rule should be strictly enforced, particularly in view of the fact that it is stipulated that the lessee is Harry Marofsky.

(Testimony of Abe Blumenfeld.)

The Court: Well, the witness testified that he conducted his negotiations with someone other than Mr. Marofsky.

Mr. Marcussen: Who is the real party in interest is probably a question of law. This witness isn't a lawyer and it isn't competent.

Mr. Taylor: If the Court please, this is utterly inconsequential and immaterial.

The Court: Off the record. [30]

(Discussion off the record.)

The Court: On the record.

Q. (By Mr. Taylor): Will you state what transpired after the lease of October 6, 1949 was executed?

A. I believe we were presented with preliminary plans at that time.

Mr. Taylor: I would like to mark for identification as Petitioner's Exhibit next in order four pages to the blueprints, stapled together.

The Clerk: Exhibit 10 for identification.

(The document above referred to was marked Petitioner's Exhibit 10 for identification.)

Q. (By Mr. Taylor): I show you Petitioner's Exhibit 10 for identification, being certain blueprints designated "Preliminary Arrangement and Longitudinal Sections, Alterations, Tivoli Theatre," and apparently bearing your name thereon.

State whether you signed those blueprints.

A. I did.

Q. And what date does that show?

(Testimony of Abe Blumenfeld.)

A. November 22, 1949.

Q. Will you state what these blueprints pertain to?

A. These were the preliminary proposals for the reconstruction of the Tivoli Theatre building into a multi-storied [31] garage building.

Q. Does your signature thereon indicate that you approved them? A. It does.

Mr. Taylor: I offer these in evidence, Petitioner's Exhibit 10 for identification.

Mr. Marcussen: No objection.

The Court: Admitted.

(The document above referred to was received in evidence as Petitioner's Exhibit 10.)

Mr. Taylor: I request permission, your Honor, to withdraw this exhibit for use by counsel on both sides in the preparation of the brief, and thereafter we can mail them to the Court.

The Court: It may be withdrawn in accordance with the rules upon giving an appropriate receipt.

Mr. Taylor: Very well.

Mr. Marcussen: If your Honor please, at this time I am inquiring of counsel as to when he thinks he will be through this case, approximately, so we can release a witness to come back later.

The witness is Mr. Marofsky himself, whom we have under subpoena, and he desires to go at this time and I don't desire to hold him unnecessarily. He is actually operating this parking lot right now, and I realize he is here at some [32] sacrifice.

So I would like to inquire of counsel approxi-

(Testimony of Abe Blumenfeld.)

mately how long he thinks his case is going to take.

Mr. Taylor: Well, your Honor, I figured that the entire case would be through by noon. As a matter of fact, I made an appointment for two o'clock on that assumption. If counsel will not object too much, I still think I will be through.

Mr. Marcussen: I am going to object whenever I feel it is necessary.

The Court: I am going to recess shortly before twelve. I suggest that if we proceed with the trial, instead of with all these matters, that we will be through sooner.

Mr. Taylor: I ask this be marked as Petitioner's Exhibit for identification, a set of blueprints consisting of many pages, designated Lodvick and Associates, "Footing plan for conversion of the Tivoli Theatre into a five-story garage," and bearing the date December 1, 1949.

The Clerk: Exhibit 11.

(The document above referred to was marked Petitioner's Exhibit 11 for identification.)

Mr. Taylor: I ask that be marked as Petitioner's Exhibit for identification, a pamphlet of 37 pages entitled "Specifications for Conversion of Tivoli Theatre to Five-story Garage, George Lodvick and Associates, Consulting [33] Engineers," which specifications go with Petitioner's Exhibit 11.

The Clerk: Exhibit 12.

(Testimony of Abe Blumenfeld.)

(The document above referred to was marked Petitioner's Exhibit 12 for identification.)

Q. (By Mr. Taylor): I show you Petitioner's Exhibits 11 and 12 for identification, being the blueprints and specifications that you have just heard me refer to.

I ask you whether these were presented to you, and if so, when?

A. These were presented to me by the lessee about three or four weeks after the preliminary plans were approved.

Q. I note that they bear the date December 1, 1949. Were they presented to you about that time?

A. On or about that time.

Q. Did you approve them on behalf of the lessor? A. I did.

Q. What do these represent?

A. These are the final detailed plans and specifications.

Q. For changing the Tivoli Theatre into a five-story garage? A. They are.

Mr. Taylor: I ask these be admitted into evidence.

Mr. Marcussen: No objection. [34]

The Court: 11 and 12 are admitted.

(The documents above referred to were received in evidence as Petitioner's Exhibits 11 and 12.)

Mr. Taylor: And I ask leave to withdraw them

(Testimony of Abe Blumenfeld.)

for use by counsel in accordance with the rules.

The Court: They may be so withdrawn.

Q. (By Mr. Taylor): Will you state whether there was any discussion of demolishing the Tivoli Theatre building at or prior to the time the lease was entered into?

A. There never was any discussion or contemplation of demolishment.

Q. At that time? A. At that time.

Mr. Marcussen: You are talking about the lease of October 6, 1949?

The Witness: The original lease.

Q. (By Mr. Taylor): Will you state, if you know, what happened after the lease was entered into and the present plans and specifications, Exhibits 9, 10 and 11—no, 10, 11 and 12 were submitted to you?

A. Well, the lessee applied to the City and County of San Francisco for a permit for the reconversion and reconstruction of the Tivoli Theatre building, and the City demanded at [35] that time that they make some very costly structural changes in the building itself, which made the cost prohibitive. The lessee then felt that it was economically unfeasible to proceed. Subsequently thereto, he came to me and asked me for permission to demolish the building.

Q. About when was that?

A. Well, I am not sure of the dates. It was several months after the permit was applied for.

(Testimony of Abe Blumenfeld.)

Q. Was that the first time that anyone had raised any question of demolishing the building?

A. Yes.

Q. Or tearing down the building had been considered by you?

A. That is the first time.

Q. Upon the execution of the lease of October 6, 1949, will you state whether the lessee took immediate possession of the property?

A. He did immediately.

Q. What did the lessee do?

A. Well, he proceeded to remove the interior doors and plumbing fixtures, lighting fixtures, and get ready for the conversion job.

Q. And to prepare the plans and specifications?

A. Yes.

Q. Will you state why the lease, although executed in [36] October, 1949, provided for no payment of rental until May 1, 1950?

A. Yes. We realized that there was a period of six to eight months that the lessee would be reconstructing the building, with no income, but we felt it was fair, under the circumstances, to commence rent payments on or about the date that we felt he would be open for business.

Q. Will you state why Blumenfeld Enterprises agreed to the demolition of the building as provided in a letter of April 24, 1950, Exhibit 4-b?

You are familiar with that letter of agreement, are you not?

A. I think I am. I would like to see it.

(Testimony of Abe Blumenfeld.)

Q. I show you Petitioner's Exhibit 4-b to the stipulation, being the letter of agreement of April 21, 1950.

You are familiar with that?

A. Yes, I am.

Q. Will you state now why Blumenfeld Enterprises, Inc. agreed to the demolition of the theatre building as provided for in that letter of agreement?

A. If the City and County of San Francisco made it prohibitive to convert the theatre building into a garage—which they did—we felt that we would be equally as well off with a vacant lot as with an obsolescent theatre building; since the lessee asked for permission to demolish it, we agreed [37] to it.

Q. Will you state when the building was demolished; by what time was the building demolished?

A. I believe the razing of the building commenced in March of 1950, and by the latter part of July it was substantially demolished.

Q. When you say March, since the agreement for its demolition was dated April 24, 1950, do you mean March or do you mean after the date of the agreement?

A. After the date of the agreement.

Q. It commenced in April?

A. Well, that is the reason I had that memo of dates.

Q. And it was practically completely demolished by July 31, 1950?

(Testimony of Abe Blumenfeld.)

A. Yes; virtually completely demolished.

Q. Did Blumenfeld Enterprises, Inc. obtain any salvage? A. None whatsoever.

Q. Did Blumenfeld Enterprises, Inc. obtain any reimbursement from any insurance company or any other kind of reimbursement? A. None.

Q. Referring to the lease of October 6, 1949, Exhibit 3-c, sub-paragraph B of paragraph 29 of said lease, this refers to reconstruction of the Tivoli Theatre property to be made in accordance with certain plans and specifications bearing the [38] date of blank.

I ask you whether the plans and specifications referred to in sub-paragraph are the ones which have been introduced into evidence here as the final plans and specifications?

A. They are referring——

Q. Referring to sub-paragraph (g) of said paragraph 29 of said lease, I call your attention to the fact that this sub-paragraph provides that "the lessor shall remove all personal property in the Tivoli Theatre building, all chairs, drapes, fixtures, carpets and miscellaneous light property."

Did Blumenfeld Enterprises, Inc., as lessor, remove said property before the building was demolished? A. It did.

Q. Or before the lease commenced?

A. That is right.

Q. It was removed?

A. Before the property was turned over to the lessee.

(Testimony of Abe Blumenfeld.)

Q. So that all that was demolished was the building itself? A. That is right.

Q. And the only loss claimed by the taxpayer was the loss in the demolition of the building?

A. That is right.

Q. No loss was claimed for personal property?

A. None.

Q. Or for equipment? A. None.

Q. Referring to the letter of April 24, 1950, Exhibit 4-d to the Petition, I call your attention to the fact that this document grants to the lessee permission to demolish the rear portion of the premises for purposes conforming to the lease.

Will you state what is meant by the "rear portion of the premises"?

A. Theatre building only.

Q. Which was in front?

A. That is right.

Q. Again referring to said letter of April 24, 1950, I call your attention that said letter states that "the lessee shall furnish to the lessor modified plans showing the proposed basement and ground floor development and shall secure from the lessors written permission for said development."

Will you explain, if you know, what that reference is to?

A. Yes; during the demolishment, the lessee thought that he might be able to develop a ground-level parking lot with a basement for additional parking, but that never developed and he filled in

(Testimony of Abe Blumenfeld.)

the basement and ended up with just a surface-level parking lot. [40]

Q. When the theatre building was in existence, both before and after the lease of October 6, 1949, will you state whether Blumenfeld Enterprises, Inc. took depreciation upon its basis for the theatre building? A. It did.

Q. And it showed that both on its books and in its tax returns? A. It did.

Q. Will you state whether there was any understanding in connection with permission granted to the lessee to demolish the theatre building with the lessee constructing some new building?

A. I am sorry, I didn't get that.

Mr. Taylor: Will you read the question, please?

(Question read.)

A. No. There never was any demand to reconstruct any kind of a building.

Mr. Taylor: Your witness.

Cross Examination

Q. (By Mr. Marcussen): Mr. Blumenfeld, I show you Petitioner's Exhibit 8, which is a picture, a diagonal picture taken at an acute angle of the front of the building. I notice that immediately to the right of the building, as it appears in the picture, there is also a parking lot. [41]

That lot was not part of the premises?

A. No.

Q. Showing you Exhibit 9, I call your attention to the fact that the picture indicates a parking area

(Testimony of Abe Blumenfeld.)

to the left of the operator's booth here in the lower left-hand corner. This is the same area?

A. That is the same area.

Q. Shown on the other Exhibit and it doesn't constitute any part of the property?

A. That is correct.

Q. That property was later acquired by——

A. Later acquired by the lessee.

Mr. Marcussen: That is all, your Honor.

Mr. Taylor: That property that was later acquired by the lessee, was not acquired from Blumenfeld Enterprises, Inc.

The Witness: No; we never had any interest in it.

Mr. Taylor: Thank you. That is all.

(Witness excused.)

Whereupon,

HERMAN HERTZ

was called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and address. [42]

The Witness: My name is Herman Hertz; my office address is 334 Sutter Street. I live in Oakland.

Direct Examination

Q. (By Mr. Taylor): Are you the gentleman who signed as a guarantor on the lease of October 6, 1949, which has been introduced into evidence here?

A. I did.

(Testimony of Herman Hertz.)

Q. Who is Harry Marofsky, the lessee on that lease?

A. Harry Marofsky is my brother-in-law.

Q. Did you handle the negotiations for the lease, for said lease of October 6, 1949? A. I did.

Q. How did Mr. Marofsky's name happen to get on that lease?

Mr. Marcussen: Object to that, if your Honor please.

Mr. Taylor: State if you know.

Mr. Marcussen: The document speaks for itself and the stipulation speaks for itself, and it shows that Harry Marofsky is the lessee; that is the basis of our objection. There is no reason for going into how his name got there. The fact speaks for itself, if your Honor please.

The Court: Well, I take it the Petitioner isn't challenging the fact that Mr Marofsky was the lessee. I take it that the Petitioner is undertaking to establish the [43] relationship between the lessee and the guarantor.

Mr. Marcussen: If that is the purpose of the question, my objection is withdrawn.

Mr. Taylor: Yes, your Honor. The point is simply this. We have shown, we think, intent is a material factor here—what was the intent of the parties?

We have shown from Mr. Blumenfeld what was the intent as a lessor, and we want to show from Mr. Hertz what was the intent of the lessee. On the face of the lease, the man's name is Marofsky. We have to show why we are calling Hertz, and that is

(Testimony of Herman Hertz.)

the whole point. It never occurred to me that anyone would object to a thing like that.

Mr. Marcussen: You have explained your calling Mr. Hertz by stating he conducted the negotiations. My objection is not addressed to that question, but to the question as to how Harry Marofsky's name got to the lease. What do we care about that here? If Mr. Taylor will say he doesn't care——

Mr. Taylor: I don't care how it got on the lease except I want to show Mr. Hertz is qualified to know what went on at the time of the negotiations and at the time of the subsequent demolition.

The Court: Are you objecting, Mr. Marcussen, to this witness speaking authoritatively on behalf of the lessee?

Mr. Marcussen: No. [44]

Mr. Taylor: That is all I want.

The Court: That washes out the entire problem at this point, does it not?

Proceed.

Q. (By Mr. Taylor): Will you state how Mr. Marofsky's name got on the lease?

A. Harry Marofsky, being my brother-in-law, after he came back from the service, he was trying to find ways and means how to make a living. So my wife thought it was my job to help him. So he thought he wanted to go in a parking lot or garage where he could make a living, and Mr. Blumenfeld wanted to have someone to make certain guarantees, so we got the lease for Harry Marofsky and me guaranteeing that lease.

(Testimony of Herman Hertz.)

Q. Were you Mr. Marofsky's financial backer?

Mr. Marcussen: Object to that, if your Honor please, on the ground it is a conclusion.

Mr. Taylor: Strike it.

Q. (By Mr. Taylor): Will you state whether you were familiar with all the negotiating pertaining to the lease? A. I was.

Q. And were you the one who was familiar on the part of the lessee with what transpired right down to the date of this trial pertaining to the lease? [45] A. That is correct.

Q. And if Marofsky is familiar with these things —is he as familiar as you are? A. No.

Mr. Marcussen: Object to that on the ground Mr. Marofsky is the best witness for that, if your Honor please. He doesn't know what Mr. Marofsky is familiar with and what he isn't; on the further ground the question is indefinite.

Q. (By Mr. Taylor): Did Mr. Marofsky know anything about the negotiations pertaining to the lease?

Mr. Marcussen: Excuse me just a minute.

Mr. Taylor: I withdrew the question.

Mr. Marcussen: Thank you; I didn't understand that.

The Witness: I don't quite get you.

Q. (By Mr. Taylor): Did Mr. Marofsky know anything pertaining to the negotiating of the lease of October 6, 1949?

Mr. Marcussen: Object to it on the ground that

(Testimony of Herman Hertz.)

Mr. Marofsky—well, same objection, if your Honor please. He can call Mr. Marofsky to explain that.

The Court: Well, Mr. Taylor, I think it has been established, or at least the Government doesn't object to this witness being the authoritative spokesman on behalf of the lessee. [46]

I think you qualified him for that purpose.

Mr. Marcussen: That isn't what I meant to say. I understood, your Honor, when you asked me that question, simply to inquire whether I have any objection to this witness testifying to the negotiations that he conducted; that is, whether he was speaking for Mr. Marofsky, and that is all I intend to do. I didn't waive any objections to his testifying to what Mr. Marofsky knows or did or anything else. I objected to his testifying for Mr. Marofsky, not however, with respect to things that this witness did when he was representing Mr. Marofsky. There is a vital distinction.

Mr. Taylor: If it is understood Mr. Hertz is the authoritative spokesman for the lessee, I won't ask any more questions.

Mr. Marcussen: Do you mean authoritative spokesman for Mr. Marofsky at the time he conducted the negotiations or now on the stand?

Mr. Taylor: Mr. Marofsky is here now and you have called him and you can ask anything you want. I am trying to establish the background of this man to show that he knows what he is talking about.

Mr. Marcussen: Let the record show that I don't know what Mr. Taylor means by his understanding

(Testimony of Herman Hertz.)

that this witness was the authorized spokesman, and I would like to have a clarification of it without changing the subject. [47]

Let's clarify that one point.

Mr. Taylor: It is easier to ask the witness.

The Court: There is too much confusion here. I am addressing myself to the witness.

Did you conduct the negotiations in connection with the execution of this lease?

The Witness: I did, your Honor.

The Court: And you were the one who dealt with Blumenfeld Enterprises?

The Witness: Yes, sir.

Q. (By Mr. Taylor): And did you conduct the negotiations in connection with the letter of agreement of April 24, 1950, pertaining to the demolition of the theatre building?

A. Yes; this was a part of the negotiations, wasn't it?

Q. Will you state the circumstances under which the lease of October 6, 1949, the circumstances under which the lease of October 6, 1949 was negotiated?

A. What do you mean by "circumstances"? Do you mean the purpose of it?

Q. Yes.

A. Well, it was our intention to take this theatre building, Tivoli, and make a garage out of it.

Q. Did you take immediate possession of the property [48] after October 6, 1949?

A. We did.

Mr. Marcussen: If your Honor please, I object

(Testimony of Herman Hertz.)

to the form of the question and ask that it be stricken on the ground that there is no showing—the question necessarily implies that Mr. Hertz here is one of the principals, and the record does not show that.

Mr. Taylor: Mr. Marcussen, I will rephrase the question.

Q. (By Mr. Taylor): Did the lessee take immediate possession of the property after the execution of the lease of October 6, 1949? A. We did.

Q. Will you state what the lessee did with regard to the preparation of plans and specifications for converting the Tivoli Theatre building into a garage building?

A. Well, while the negotiations went on, we consulted with an engineer, or architect, and we wanted to know what it will cost to convert it. So while the negotiations went on, we consulted with this engineer as to whether the job can be done and how much it would cost.

Does that answer your question?

Q. Yes. Did that engineer prepare plans and specifications for conversion into a five-story garage? A. He did. [49]

Q. I show you Petitioner's Exhibits 10, 11 and 12. Will you look at these and state if these are the plans and specifications which were prepared.

A. These are the plans that were prepared.

Q. Petitioner's Exhibit 10, are those the preliminary plans?

A. Those were the first plans.

(Testimony of Herman Hertz.)

Q. And Petitioner's Exhibits 11 and 12, are those the final plans and specifications?

A. Yes; this was the detail.

Q. The final ones? A. Yes.

Q. Did the lessee pay the engineer for preparing these plans and specifications?

A. We did.

Q. Will you state how much?

A. I don't remember exactly; it would be about $3,000 or $4,000, I believe.

Q. Will you state at or prior to the time the lease was entered into, did the lessee or anyone, you on behalf of the lessee, give any thought to demolishing the theatre building? A. No.

Q. Was the thought to convert the building into a five-story garage? [50] A. Exactly.

Q. There was no discussion of demolishing the theatre building at that time? A. No.

Q. Will you state what, at the time the plans and specifications were prepared, the engineer, Mr. Lodvick's estimate was for reconverting the theatre building into a five-story garage?

A. It was somewhere between $45,000 and $50,000.

Q. Will you state whether the lease was executed on the assumption of a cost of 45 to 50 thousand for reconversion? A. That is correct.

Q. Will you state what transpired after the plans and specifications, Exhibits 11 and 12 for the conversion of the theatre building into a five-story garage, what transpired?

(Testimony of Herman Hertz.)

A. Well, in order to start working we had to get a permit, but Mr. Lodvick a few weeks later advised us he couldn't——

Q. A permit from whom?

A. From the City of San Francisco.

Q. And Mr. Lodvick was not able to get that permit?

A. No; he was not able to get it.

Q. Will you state, if you know, why the permit was refused?

A. Well, if I remember correctly, he explained to us [51] that the building was not good enough or strong enough to be converted into a garage. I remember distinctly asking him how come the building that was good enough for the housing of people is not strong enough for a car, and he told me that he just can't get a permit, or that certain things had to be done, strengthening the walls, and so on.

Q. Did he indicate what it would cost to meet the City's conditions to obtain a permit?

A. He took a few weeks' time to do some work and informed us that it would cost upwards of $125,000.

Q. And did you or anyone on behalf of the lessee consider spending such an amount in the reconversion of the building?

A. No. We didn't feel that we could ever get our money out, or that much money out of it.

Q. So the City's condition for a permit killed the five-story garage plan, did it?

A. That is correct.

(Testimony of Herman Hertz.)

Q. When was that?

A. What do you mean?

Q. About what date did this transpire?

A. I don't know. That would be about, say a month or two after these completed plans were done.

Q. About January or February of 1950?

A. I would say so. [52]

Q. When you found the City was making the reconversion job too expensive, what did the lessee then do?

A. Oh, for weeks we were confused. We didn't know what to do. We were in and didn't know what to do, and for two or three months we didn't do anything until I was advised to see another engineer, and I did.

I did consult another engineer, and after the other engineer went down to the building, I met with him and he told me that nothing can be done; if we wanted to convert it, we would have to meet the City's requirements. He told me further that as an engineer he believed it to be a mistake, and that the best thing would be to demolish the building.

Q. A mistake because it wouldn't pay out?

A. Exactly.

Q. Was this the first time that it was suggested to you or to anyone on behalf of the lessee that the building be torn down? A. That is right.

Q. What transpired thereafter?

A. After thinking about it for a week or so I finally landed in Mr. Blumenfeld's office because I had to get permission to demolish it.

(Testimony of Herman Hertz.)

Q. Abe Blumenfeld? A. That is correct.

Q. Who is Mr. M. L. Rose? [53]

A. He is a real estate broker.

Q. Who represented the lessee in connection with the lease negotiations? A. That is right.

Mr. Marcussen: Represented whom?

Mr. Taylor: The lessee.

Mr. Marcussen: The lessee?

Mr. Taylor: Yes; isn't that right?

Mr. Marcussen: That is not my understanding of it. Did Mr. Rose represent you people or the lessor? What is your understanding of it, Mr. Hertz?

The Witness: I don't quite know the difference.

Mr. Marcussen: I move to strike the question and answer.

Mr. Taylor: No objection. I am simply trying to explain a few things that are not clear.

Q. (By Mr. Taylor): When the lessee originally contemplated leasing the Tivoli Theatre building, did it consider any use for the building other than as a garage?

A. We entered into negotiations with specific things in mind, to convert it into a garage, but didn't have any other use in mind at all.

Q. When the lessee found that the building couldn't be converted into a garage because of the City requirements, [54] did the lessee consider any other use for the building?

A. No; we didn't need it.

(Testimony of Herman Hertz.)

Q. Did the lessee feel that there was some other use possible for it?

A. Well, we didn't think so; as far as we were concerned.

The Court: Let's recess at this time until 2:15.

(Whereupon, at 11:45 o'clock a.m., a recess was taken until 2:15 p.m. of the same day.)

Afternoon Session—2:15 p.m.

The Court: The hearing will come to order, please.

Whereupon,

HERMAN HERTZ

resumed his testimony as follows:

Mr. Taylor: I have just a few clarifying questions and I will be through.

Direct Examination—(Continued)

Q. (By Mr. Taylor): Mr. Hertz, referring to Exhibit 4-d, the letter of agreement of April 24, 1950, I call your attention to the fact that it refers to the Tivoli Theatre property.

Will you state whether, so far as this document pertains to an option of sale, it had reference to both the theatre and the office building?

A. Yes; it had reference to both buildings.

Q. And so far as it pertained to consent to tearing down a building, it had reference to just the theatre property? A. Yes.

Q. Mr. Hertz, referring to Exhibit 5-e, to the stipulation of facts, being an agreement dated Feb-

(Testimony of Herman Hertz.)

ruary 23, 1951, between Blumenfeld Enterprises, Inc. and Harry Marofsky, I call your attention that this seems to refer to the Tivoli Theatre building, this being an option for the purchase of the Tivoli property. [56]

Will you state whether that reference is an error, and whether actually this document covered both the theatre property and the office building?

A. The option was on both buildings, the rear and front buildings.

Q. So the reference merely to the theatre building in this Exhibit 5-E to the stipulation of facts, was an error? A. That is right.

Q. Mr. Hertz, one more clarifying question.

I show you Exhibit 2, Item P to the stipulation of facts, being a map of the properties involved, and I show you that fronting on Eddy Street next to the office building and in front of the parking area previously occupied by the theatre building, there are two areas designated as "additional parking" and "hotel", both fronting on Eddy Street; the hotel being next to that. Were these two properties a portion of the Tivoli property?

A. No. They had nothing to do with it.

Q. Simply to clarify the record, Mr. Hertz, when the option to purchase the Tivoli property, the entire Tivoli property was exercised, who acquired the property? A. The Hertz Shoe Clinic.

Q. Do you own the stock of that Clinic?

A. I own some of it.

(Testimony of Herman Hertz.)

Q. Are you the president? [57] A. Yes.

Q. Do you control the Hertz Shoe Clinic?

A. I own some of the stock; my brother and I own it.

Q. The Hertz Shoe Clinic is a corporation, is it?

A. Yes, sir.

Q. Mr. Hertz, did the lessee know at the time of the demolition whether or not the lessee would exercise the option to purchase the Tivoli property?

A. I don't quite understand you.

Q. At the time that the Tivoli Theatre was torn down, or at the time the letter of agreement of April 24, 1950, Exhibit 4-d to the stipulation, was entered into, did the lessee know at that time whether or not it would exercise the option to purchase which was given to it therein?

Mr. Marcussen: Objection, if your Honor please; this witness is not the witness to answer that question, as to what the lessee knew and didn't know.

Mr. Taylor: I tried to phrase it that way to overcome Mr. Marcussen's distinction heretofore made, simply to save time. If you consider the form of the question objectionable, I can rephrase it to ask Mr. Hertz if he knew, but I frankly don't see that there is anything to that objection.

Mr. Marcussen: It isn't a matter of form. I think it is a matter of substance. This witness isn't competent to testify as to what the lessee knew; the lessee is right here [58] in court.

Mr. Taylor: He is the man that handled everything.

(Testimony of Herman Hertz.)

The Court: Well, he was the guarantor on the lease, in any event, I take it.

Mr. Marcussen: A limited guarantor for $10,000.

The Court: I am reasonably satisfied that he was acting on behalf of the lessee throughout the lessee's relationships with the lessor. I think the circumstances here are such that this witness may answer that question.

The Witness: Do you mind repeating it?

(Question read.)

The Witness: No, we didn't.

Mr. Taylor: Thank you. That is all.

Mr. Marcussen: No cross-examination.

(Witness excused.)

* * * * * [59]

Whereupon,

HERMAN HERTZ

recalled as a witness, having been previously duly sworn, was further examined and testified as follows: * * * * * [68]

Redirect Examination

Q. (By Mr. Taylor): Mr. Hertz, I show you Respondent's Exhibits G and H in evidence, being a supplemental agreement dated the 7th day of November, 1951, and notice of exercise of option to purchase real property dated the 27th day of Sep-

(Testimony of Herman Hertz.)

tember, 1951, and call your attention to the fact that these referred to the Tivoli Theatre property.

Actually, at that time, they covered the entire Tivoli property, both the office building and the theatre area? A. That is right.

Mr. Taylor: No further questions.

(Witness excused.)

* * * * * [81]

[Endorsed]: T.C.U.S. Filed April 5, 1954.

RESPONDENT'S EXHIBIT "G"

[Received in Evidence March 16, 1954]

NOTICE OF THE EXERCISE OF OPTION TO PURCHASE REAL PROPERTY

To Blumenfeld Enterprises, Inc., 70 Eddy Street, San Francisco, California:

Your attention is directed to that certain agreement and option dated the 23d day of February, 1951, by and between Blumenfeld Enterprises, Inc., a corporation, (therein called the seller) and Harry Morofsky (therein called the buyer), whereby said seller gave to said buyer the exclusive right to buy, on or before October 1, 1951, at 12:00 o'clock noon, standard time, all that certain land and building situated in the City and County of San Francisco, State of California, generally known and designated

as the entire Tivoli Theater Building, number 70 Eddy Street, San Francisco, California, and more particularly described as follows:

Beginning at a point on the northerly line of Eddy Street, distant thereon 68 feet and 9 inches easterly from the easterly line of Mason Street; running thence easterly along said line of Eddy Street 68 feet and 9 inches; thence at a right angle northerly 89 feet and 6 inches; thence at a right angle easterly 75 feet to the westerly line of Glasgow Street; thence at a right angle northerly along said line of Glasgow Street 96 feet; thence at a right angle westerly 75 feet; thence at a right angle southerly 10 feet and 6 inches; thence at a right angle westerly 68 feet and 9 inches; and thence at a right angle southerly 175 feet to the point of beginning.

Being part of 50 Vara Block No. 171. For the purchase price of Three Hundred Thirty-five Thousand Six Hundred Twenty-two and No/100 ($335,-622.00) Dollars.

You Are Hereby Notified that the undersigned Harry Morofsky does elect to exercise said option to purchase said real property on the terms and conditions stated in said agreement and option.

During the escrow period provided for in said agreement and option, you will be notified in whose name the title to said real property will be taken.

You are requested to select an escrow holder pursuant to paragraph 6 of said agreement and option

in order that said transaction may be closed within the time limit specified therein.

Dated: September 27, 1951.

/s/ HARRY MOROFSKY

Receipt acknowledged this 27th day of September, 1951.

Blumenfeld Enterprises, Inc.

/s/ By A. Blumenfeld, Secretary

RESPONDENT'S EXHIBIT "H"
[Admitted in Evidence March 16, 1954]

SUPPLEMENTAL AGREEMENT

This Supplemental Agreement, made and entered into this 7th day of November, 1951, by and between Blumenfeld Enterprises, Inc., a corporation duly organized and existing under and by virtue of the laws of the State of California, herein called "Seller", Harry Morofsky, herein called "Buyer", and Hertz Shoe Clinic, Inc., a corporation, duly organized and existing under and by virtue of the laws of the State of California, herein called "Assignee",

Witnesseth:

Whereas, on February 23, 1951, the Seller and the Buyer made and executed an option agreement, wherein the Seller agreed to sell on the terms expressed in said agreement, certain land and building situated in the City and County of San Fran-

cisco, State of California, more particularly described in said option agreement; and

Whereas, on September 27, 1951, in accordance with said option agreement, the Buyer notified the Seller in writing of his election to purchase the land and building on the terms and conditions stated in said option agreement; and

Whereas, the title to said land and building are to be taken in the name of the Assignee; and

Whereas, the parties hereto mutually desire to change and amend the terms of said option agreement dated February 23, 1951.

Now, Therefore, it is mutually agreed as follows:

1. The Buyer and the Assignee do hereby jointly and severally represent and warrant to the Seller that prior to the execution of this agreement, the Buyer has assigned and transferred to the Assignee all of the right, title and interest of the Buyer, in and to that certain option agreement, dated February 23, 1951, between Blumenfeld Enterprises, Inc., as Seller and Harry Morofsky, as Buyer, together with any right that the Buyer has had, or now has, to purchase from the Seller the land and building described in said option agreement.

2. That the purchase price of said land and building, described in said option agreement, shall be the sum of Three Hundred and Thirty-five Thousand, Six Hundred and Twenty-two ($335,622.00) Dollars, which sum shall be paid to the Seller as follows:

(a) Within the time specified in said option agreement, the Assignee shall pay the Seller the sum of One Hundred and Eighty-four Thousand, One Hundred and twenty-two ($184,122.00) Dollars in cash.

(b) The Assignee shall receive credit on account of the purchase price for all deposits made by the Lessees on the leases specified in paragraph 1, subdivision (c) of said option agreement in the amount of Twenty-six Thousand Five Hundred ($26,500.00) Dollars.

(c) The balance of the purchase price, namely, the sum of One Hundred and Twenty-five Thousand ($125,000.00) Dollars, shall be evidenced by a promissory note made by the Assignee to the Seller, which said promissory note shall be secured by a second deed of trust on the real property described in said option agreement, and which said deed of trust shall be junior only to a first deed of trust made by the Assignee, as Trustor, to H. R. Ehlers and H. H. Tantau, as Trustees, and Crocker First National Bank of San Francisco, a national banking association, as beneficiary, dated the 26th day of October, 1951, which said first deed of trust is the security for a promissory note made by said Assignee to said Bank in the amount of Three Hundred Thousand ($300,000.00) Dollars, and which said first deed of trust shall cover two parcels of real property, in addition to the property described in said option agreement.

Said promissory note in the amount of One Hundred Twenty-five Thousand ($125,000.00) Dollars,

secured by said second deed of trust shall bear interest at the rate of four and one-half (4½%) per cent per annum on the principal amount and on decreasing balances thereof. The principal amount of said promissory note shall be payable by the Assignee to the Seller in monthly installments of One Thousand Two Hundred and Fifty ($1,250.00) Dollars, or more, plus interest, until the obligation of the Assignee to the Seller is fully paid.

Said promissory note and said second deed of trust shall be on a standard form generally used by title insurance companies in the City and County of San Francisco, State of California, and approved in writing by the Seller.

3. If, after said land and building have been purchased, pursuant to the terms of said option agreement, as amended hereby, the Assignee shall desire to refinance the existing encumbrances against said real property, the Seller agrees to permit the same by removing from record the second deed of trust mentioned in paragraph 2(c) of this Supplemental Agreement and by cancelling the promissory note for which said second deed of trust is the security, and by accepting from the Assignee contemporaneously another promissory note in the amount then due from the Assignee to the Seller, but otherwise on the same terms, and which said new promissory note shall be secured by another second deed of trust which shall be junior only to a first deed of trust hereafter to be executed by the Assignee, subject to the following conditions:

(a) That the deed of trust constituting the first

encumbrance against said real property shall not be in a sum greater than Three Hundred Twenty-five Thousand ($325,000.00) Dollars, without the written consent of the Seller.

(b) That the moneys realized from such refinancing shall be used by the owner.

(i) first, to finance the erection of a structure on said real property.

(ii) second, to apply any excess sums remaining after the erection of a building on said real property to further reduce the obligation of the Assignee to the Seller under said promissory note secured by said second deed of trust.

(c) Upon refinancing and prior to the commencement of any building development on the real property, the Assignee shall furnish the Seller with plans and specifications showing the proposed improvements to be made, and secure the Seller's written assent thereto, and such improvements shall be commenced by the owner within six (6) months from the date of such refinancing. The Assignee shall submit said plans and specifications to the Seller for approval within ninety (90) days after the completion of such refinancing; the Seller shall have thirty (30) days thereafter to approve or disapprove in writing, said plans and specifications. If the Seller does not approve the same within the time specified, the plans and specifications shall be deemed to have been approved by the Seller. If the same are disapproved by the Seller, within said time, the Assignee shall have sixty (60) days after such disapproval within which to submit revised

plans and specifications and within which to commence the proposed improvements, which said revised plans and specifications shall likewise be subject to the written approval or disapproval by the Seller within thirty (30) days thereafter. After refinancing and disbursements of funds as provided from said refinancing in this paragraph and if construction of the proposed improvements be not commenced within the six (6) months time limit set forth herein, then all funds in the escrow shall be paid to the Seller for application to a pro tanto reduction in the obligation of the Assignee under the aforementioned second deed of trust.

(d) Any moneys realized by refinancing shall be escrowed in writing, either with the financial institution or person lending the money for such refinancing, or with an escrow company to be selected by the Seller, and all disbursements made therefrom shall be used to pay the obligations, or to defray the costs and expenses enumerated in this paragraph, and all disbursements in this escrow shall be subject to the written approval of the Seller.

4. That the lease from the Assignee to the Seller mentioned in paragraph four (4) of said option agreement, and appended thereto as Exhibit "A" thereof shall be amended in the following particulars:

(a) By specifying the manner in which the arbitrators, who shall determine the rental during the extended period, shall be selected.

(b) By giving the Lessor in said lease the right and option to terminate said lease after five (5) years for the purpose of demolishing the building, upon one hundred and eighty (180) days previous written notice.

(c) That attached hereto marked Exhibit "A" and by such reference made a part hereof, are paragraphs 20 and 21 which are to be added to and made a part of that certain indenture of lease which is annexed to the option agreement of February 23, 1951, hereinbefore referred to and marked Exhibit "A" as annexed to said last-mentioned agreement.

5. Except as modified hereby, the parties hereto do confirm, approve and continue in effect, that certain option agreement dated February 23, 1951, between Blumenfeld Enterprises, Inc., as Seller and Harry Morofsky, as Buyer.

In Witness Whereof, the parties hereto have set their hands and seals the day and year first above written.

Blumenfeld Enterprises, Inc.,
a Corporation

/s/ By Joseph Blumenfeld, President

/s/ By A. Blumenfeld, Secretary

Seller

/s/ Harry Morofsky, Buyer

[Seal] Hertz Shoe Clinic, Inc., a Corporation

/s/ By Herman Hertz, President

/s/ By Paul Hertz, Secretary

Assignee

EXHIBIT "A"

20. If the Lessee exercises the option of the Lessee of renewing this lease for an extended term of ten (10) years, as provided for herein, and the parties hereto are unable to agree upon the rental for the demised premises for the extended term, the amount of the rental during the extended term shall be submitted to arbitration in accordance with the provisions of title X of part III of the Code of Civil Procedure of the State of California, and shall be in all respects governed by and construed according to the laws of the State of California; said controversy shall be arbitrated by a person or persons to be chosen by the respective parties for the purpose; provided, that if the parties fail to agree upon the person or persons to be named by them, or if either party hereto shall fail or refuse to submit the controversy to such arbitration, the other party may make application to the Superior Court of the State of California for an order directing such controversy to proceed to arbitration and/or naming the person or persons who shall be arbitrator or arbitrators, if he or they have not been named by the parties hereto. Said application, arbitration and award and the proceedings therefor, and any proceedings for the vacation, modification, correction or confirmation of said award by said court or a judgment thereon, or an appeal therefrom, shall be in accordance with the provisions of the Code of Civil Procedure above specified and of the laws of the State of California, except that each party hereto consents that, if he or she is outside

of the State of California, the service by registered mail upon him or her, as the case may be, of any notice, summons or other writ or process not less than thirty or more than sixty days before the hearings is scheduled to which such notice, summons, writ or process pertains in connection with the arbitration herein agreed to, shall be a valid service upon such party of such notice, summons, writ or process.

21. Anything in this lease to the contrary notwithstanding, it is agreed that the Lessor shall have the right and option to terminate this lease and the term hereof at any time after January 1, 1957, for the purpose of demolishing the building in which the demised premises are located, upon giving one hundred eighty (180) days' previous notice in writing to the Lessee of the Lessor's intention so to terminate the same; and this lease and the term hereof shall cease and terminate at the expiration of one hundred eighty (180) days from the service of said notice on the Lessee, as provided in paragraph fourteen (14) of this lease.

[Endorsed]: No. 14822. United States Court of Appeals for the Ninth Circuit. Blumenfeld Enterprises, Inc., Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: July 19, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14822

BLUMENFELD ENTERPRISES, INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S STATEMENT OF POINTS

Petitioner states that it intends to rely upon the following points upon the review of the decision of The Tax Court of the United States in the above-entitled cause:

1. The Tax Court erred in holding and deciding that in the determination of the petitioner's net operating loss carry-back from its fiscal year ended

July 31, 1950 and in the determination of its income tax liability for its fiscal year ended July 31, 1948, a deduction was not allowable to the petitioner for the undepreciated cost of a building demolished by its lessee with its permission during the fiscal year ended July 31, 1950.

2. The Tax Court erred in that its opinion and decision are contrary to the law and the regulations and are not supported by substantial evidence of record.

3. The Tax Court erred in ordering and deciding that there was a deficiency in petitioner's income tax liability for its fiscal year ended July 31, 1948 in the amount of $31,405.31 and in failing to decide that the petitioner had overpaid its income taxes for its said fiscal year by the amount of $30,803.55.

Dated: August 31, 1955, San Francisco, California.

/s/ SAMUEL TAYLOR,
/s/ WALTER G. SCHWARTZ,
Counsel for Petitioner

[Endorsed]: Filed Aug. 31, 1955. Paul P. O'Brien, Clerk.

No. 14,822

IN THE

United States Court of Appeals

For the Ninth Circuit

BLUMENFELD ENTERPRISES, INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for Review of the Decision of The Tax Court of the United States.

BRIEF FOR PETITIONER.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Codes

Regulations

No. 14,822

IN THE

United States Court of Appeals

For the Ninth Circuit

BLUMENFELD ENTERPRISES, INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for Review of the Decision of The Tax Court of the United States.

BRIEF FOR PETITIONER.

OPINION BELOW.

The only previous opinion is that of The Tax Court of the United States promulgated January 20, 1955. The findings of fact and opinion of The Tax Court are reported at 23 T. C. 665 (R. 85-99).

JURISDICTION.

This appeal involves income taxes. By a notice of deficiency dated December 12, 1951 and addressed to the petitioner, the Commissioner of Internal Revenue determined a deficiency of $31,710.06 in the peti-

tioner's income taxes for the taxable year ended July 31, 1948 (R. 8-12). Petitioner filed a petition with The Tax Court of the United States on February 25, 1952, seeking a redetermination of the deficiency set forth in said Notice of Deficiency (R. 1), and petitioner filed an amended petition for such redetermination with The Tax Court on March 16, 1954 (R. 2, 4-8). The decision of The Tax Court was entered on March 23, 1955 and found a deficiency in income tax for petitioner's fiscal year ended July 31, 1948 in the amount of $31,405.31 (R. 99). The case was brought to this Court by a Petition for Review filed on June 13, 1955 (R. 100-101). The jurisdiction of this Court to review the aforesaid decision of The Tax Court is founded on Sections 7482 and 7483 of the Internal Revenue Code of 1954.

QUESTION PRESENTED.

During the taxable year ended July 31, 1950, a building owned by the plaintiff and known as the Tivoli Theatre Building became worthless and was demolished. The only issue before this court is whether petitioner's remaining cost for that building —which has been stipulated to be $132,284.42— (1) constitutes a deductible loss for the taxable year ended July 31, 1950 as the petitioner contends, or (2) may be recovered only by way of a depreciation or amortization allowance over the term of the lease, as the Commissioner contends. If a deductible loss was incurred by the petitioner in its taxable year ended July

31, 1950, that loss forms part of the petitioner's net operating loss carry-back from its said taxable year to its taxable year ended July 31, 1948 and is allowable as a deduction for income tax purposes for the taxable year ended July 31, 1948. There is no question as to the amount of loss or as to the availability or amount of the carry-back.

STATUTES AND REGULATIONS INVOLVED.

The statutes and regulations involved are set out in the Appendix, *infra.*

STATEMENT OF THE CASE.

The facts found by The Tax Court (R. 86-93) may be summarized as follows:

The petitioner is a California corporation with its principal office in San Francisco. It filed its corporation income tax returns for its fiscal years ended July 31, 1948, July 31, 1949 and July 31, 1950 with the Collector of Internal Revenue for the First District of California. It keeps its books and files its returns on the accrual basis (R. 86).

Petitioner's principal business is the operation of theatres. On or about March 10, 1946, petitioner purchased a fee interest in the so-called Tivoli property in San Francisco, which consisted of two adjacent, but separate, buildings. One of the buildings was known as the Tivoli Theatre Building and the

other as the Tivoli Office Building. The Theatre Building had been constructed in 1911. It had once been an opera house and a famous theatrical landmark in San Francisco. After petitioner acquired the Theatre Building, it was used for legitimate stage performances and for the presentation of motion pictures until June 2, 1947. By 1947, the district in which the theatre was located was no longer a desirable theatrical district; there were many bars in the area, and it had become a "tenderloin" district. Its location was away from the main theatre and entertainment district. From June 2, 1947 until October 6, 1949, the theatre was closed except for one three-day period in 1948 when it was rented for an outside theatrical showing. Petitioner closed the theatre in 1947 because it was losing money on its operation and found it economically impractical to keep it running. Petitioner thereafter had no intention of using the property as a theatre again (R. 86-87).

The Tivoli Office Building from the date of its acquisition by petitioner has been used as an office building, and a portion of the ground floor has been occupied by a cocktail lounge and bar (R. 87).

On October 6, 1949 petitioner, as lessor, and Harry Morofsky, as lessee, executed a lease of the Theatre Building for a term of twenty-five years at an aggregate rental of $420,000. In addition, the lessee agreed to pay all real estate taxes and charges levied against the property. The term of the lease was to start May 1, 1950, but the lessee was allowed to enter immediately for the purpose of beginning the neces-

sary alterations. It was contemplated that the property be converted into a public garage (R. 87-88).

Under the lease, the lessee was required to submit to petitioner for its approval plans for the remodeling of the building. In the latter part of 1949 preliminary and final plans for a five-story garage were prepared by the lessee and were approved by the petitioner. It was anticipated by the lessee that the cost of remodeling would be between $45,000 and $50,000 (R. 88).

When the lease was entered into October 6, 1949, neither the petitioner nor the lessee had any intention of demolishing the Theatre Building (R. 88-89).

In November 1949, the lessee submitted to the proper authorities of the City and County of San Francisco his plans for remodeling the Tivoli Theatre Building to convert it into a five-story parking garage. The authorities declined to approve the plans as submitted and insisted upon costly revisions of such a nature as to reduce substantially the amount and convenient usability of floor space for parking purposes. The cost of remodeling, if performed in accordance with the plans required by the authorities, was in excess of $125,000. It was not economically feasible to incur such cost, and the plans for remodeling the Theatre Building therefore had to be abandoned (R. 89).

The lessee then consulted another engineer who advised that the Theatre Building be demolished and that the area thus released be used for surface parking (R. 89).

On April 24, 1950, the lessor and the lessee entered into a letter agreement granting to the lessee an option to purchase the entire Tivoli property and giving the lessee permission to demolish the Theatre Building. That agreement reads in part as follows (R. 89-91):

"1. The sale price is to be $350,000.00.

2. The sum of $25,000,00 is to accompany the sale agreement, in consideration for which the Purchaser shall have an option to conclude the deal within one (1) year.

* * * * *

5. In the event the Purchaser does not conclude the purchase of the property within one (1) year, the $25,000.00 mentioned under No. 2 above shall remain with the Seller as additional lease deposit under that certain lease dated the 6th day of October, 1949, between Blumenfeld Enterprises, Inc., as lessors, and Harry Morofsky, as lessee, and shall be deducted from rentals at the end of the lease term. In consideration of this additional lease deposit, the lessors grant to the lessee permission to demolish the rear portion of the premises [Theatre Building] for the purposes conforming to said lease and further provided the lessee shall furnish to the lessor modified plans showing the proposed basement and ground floor development and shall secure from the lessors written permission for said development. All of the cost of demolishing and improving shall be at the lessee's sole cost and expense.

6. The Seller, as the lessor, expressly retains all of their rights under the aforementioned lease dated October 6, 1949, and makes no waiver of any of the conditions of said lease. * * *

> 7. In the event the Purchaser exercises his option to purchase within the one (1) year period, then he shall be given credit by the Seller for the net gross profit from the operation of all of the premises in the interim period. The Seller shall deduct from said rentals, taxes, insurance, utility costs and all other legitimate items of expense."

The $25,000 payment referred to above was made on May 1, 1950. When the letter agreement of April 24, 1950, was entered into, the lessee did not know whether or not he would exercise the option to purchase which was given therein (R. 91).

The "formal" agreement contemplated by the parties was executed on February 23, 1951. By its terms the time for exercise of the lessee's option was extended to expire on October 1, 1951, and the lessee was expressly required, notwithstanding anything in the lease of October 6, 1949, to the contrary, to clear the portion of the property formerly occupied by the theatre. The lessee was also expressly authorized to use the "premises and area for parking lot purposes by erecting a ramp for ingress and egress therefrom through the old entrance to the Tivoli Theatre." Pursuant to permission granted by the lessor in paragraph "5" of the letter agreement of April 24, 1950, the lessee had already demolished the Theatre Building on or about May 1, 1950, prior to the end of petitioner's fiscal year ended July 31, 1950 (R. 91).

There was at no time any understanding or plan, either by the petitioner or the lessee, to construct a

new building on the theatre property, and no building has ever been constructed thereon (R. 92).

On September 27, 1951, Harry Morofsky exercised the option granted by the agreements of April 24, 1950 and February 23, 1951, to purchase the Tivoli property, and on November 7, 1951, assigned his rights thereunder to the Hertz Shoe Clinic, Inc., a corporation. That corporation is now the owner of the Tivoli property (R. 92).

In its income tax return for its fiscal year ended July 31, 1950, the petitioner claimed as a deduction a loss on the demolition of the Tivoli Theatre Building in an amount representing the undepreciated balance of the cost of that building as shown on petitioner's books,* resulting in a net operating loss of $82,818.32 for its fiscal year ended July 31, 1950. Petitioner claimed a net operating loss carry-back of $82,818.32 from its fiscal year ended July 31, 1950 to its fiscal year ended July 31, 1948, and made application for a tentative carry-back adjustment under Section 3780 of the Internal Revenue Code of 1939. A tentative allowance was made to petitioner under this section in the amount of $30,803.55 (R. 92-93).

In his determination of petitioner's deficiency for the fiscal year ended July 31, 1950, respondent has disallowed the deduction claimed upon the demolition of the Tivoli Theatre Building, and in his notice of deficiency to petitioner for its fiscal year ended July

*It has been stipulated that the total unrecovered cost of the Theatre Building and its improvements as of the date of demolition was $132,284.42.

31, 1948, respondent has not allowed the net operating loss deduction claimed by petitioner (R. 93).

STATEMENT OF POINTS TO BE URGED.

The petitioner's statement of points is set out in full on pages 153-154 of the Record. Simply stated, petitioner maintains that it suffered a deductible loss in its taxable year ended July 31, 1950 when during that year the petitioner's Tivoli Theatre Building became worthless and was demolished, that said loss became part of petitioner's net operating loss carryback from its taxable year ended July 31, 1950 to its taxable year ended July 31, 1948 and is allowable as a deduction for income tax purposes for its taxable year ended July 31, 1948. The Commissioner disallowed the loss claimed by the petitioner in its return for its taxable year ended July 31, 1950 on the following ground (R. 23):

> "The unrecovered cost of the building voluntarily demolished in connection with securing the lease is held to be a capital cost of the lease amortizable over the life of the lease. The claimed abandonment loss is therefore disallowed."

The only question, then, is: May the taxpayer deduct the undepreciated cost (its remaining basis) of a building demolished in its fiscal year ended July 31, 1950 during that year (as it did in its return) or must it deduct such remaining cost by way of amortization over the twenty-five year term of the lease (as the Commissioner contended in his Notice of Defi-

ciency and The Tax Court in its opinion in effect decided)?

ARGUMENT.

INTRODUCTION AND SUMMARY.

The opinion of The Tax Court misstates the issue, and that misstatement is at the basis of its erroneous decision. It regards the issue as being whether the demolition of the Tivoli Theatre Building in the fiscal year of the taxpayer ended July 31, 1950, resulted in a deductible loss to the taxpayer. It reaches the conclusion that no deductible loss was incurred as a result of the demolition, and that to allow the deduction would be to give the taxpayer "a *windfall* that Congress never intended" [Emphasis supplied]. (R. 99). The Tax Court's conclusion that there was no loss is not true, and its conclusion that to allow a deduction would result in a "windfall" is equally untrue. The error of The Tax Court can be readily demonstrated. In the first place, at the time of its demolition the building concededly had an unrecovered cost or basis of $132,284.42 (R. 92). There has never been any question but that this amount may be deducted. The only question is whether the amount may be deducted in the year of demolition or whether it must be spread over the term of the lease. The Commissioner, in his notice of deficiency for the fiscal year ended July 31, 1950 (the year of the demolition) states that the amount is to be recovered by amortization over the twenty-five year term of the lease (R. 22-23). The taxpayer

contends that this amount may be deducted in full in the year of the demolition of the building.

Clearly, during the taxable year in question, the building became worthless (R. 123, 138). Plainly, from an every day "common sense" viewpoint there was a "loss" either when the building became worthless or when, later in the same taxable year, it was demolished. Before the demolition the taxpayer had a building with an unrecovered basis thereof of $132,-284.42 (R. 92). After the demolition, the taxpayer had no building. Taxpayer submits that the amount of its cost basis constitutes a deductible loss in the year of worthlessness and demolition, and that the taxpayer should not be required to amortize that cost over the term of a lease entered into not with the thought of demolishing the building but with the intention of utilizing it.

The general rule is that a loss on the demolition of an old building is deductible in the year of demolition. To this rule, only three exceptions have been recognized. The exception here relied upon by the Commissioner and by The Tax Court is that where an old building is demolished in order to obtain a lease, the undepreciated cost of the old building constitutes a cost of obtaining the lease. Hence, the unrecovered cost of the building is amortizable over the terms of the lease and is not deductible in full in the year of demolition. However, this exception is not applicable here. Permission to demolish the building was *not* given to the lessee in order to obtain the lease; the lease was executed at a time when

there was no intention to demolish the building. Unexpected events occuring after execution of the lease led to the demolition. The agreement giving the lessee permission to demolish the building did not give to the taxpayer a more valuable leasehold, and hence it cannot be said that taxpayer secured anything in exchange for the permission granted the lessee to demolish the building. Furthermore, the building actually became worthless during the taxpayer's fiscal year ended July 31, 1950, the year in which it was demolished and a deductible loss should be allowed to the taxpayer in that year on that ground irrespective of the lease.

I. THE GENERAL RULE IS THAT A LOSS ON THE DEMOLITION OF AN OLD BUILDING IS DEDUCTIBLE IN THE YEAR OF DEMOLITION.

The general rule is that a loss on the demolition of an old building is deductible in the year of demolition, whether or not such removal is "incident to renewals and replacements", *Dayton Co. v. Commissioner* (CA 8, 1937), 90 F. 2d 767; *Ingle v. Gage* (W D N Y 1931) 52 F. 2d 738; *Work Clothing Corp.* (1949) 8 TCM 506. The reason for the rule is simple. Before the demolition, a taxpayer owns a building with an undepreciated cost to him, in this case, of approximately $132,000. After the demolition, he no longer has the building. Unless he may deduct his undepreciated cost or unless he has in the transaction acquired other assets to which this cost can be applied, he will be penalized by the loss of his cost or basis of $132,000.

As this Court states in *Young v. Commissioner* (CA 9, 1932) 59 F. 2d 691:

> "* * * There can be no question that where a land owner finds it necessary to remove structures unsuitable for further use, he may have a reduction from gross income for the loss."

At least until the decision of The Tax Court in the instant case, the courts had recognized only three exceptions to the general rule that demolition losses are deductible in full in the year of demolition, and, in fact, not all courts have recognized all of these three exceptions.

The first and clearest of these exceptions is stated in Section 29.23(e)-2 of Treasury Regulations 111 as follows:

> "When a taxpayer buys real estate upon which is located a building, which he proceeds to raze with a view to erecting thereon another building, it will be considered that the taxpayer has sustained no deductible loss by reason of the demolition of the old building, and no deductible expense on account of the cost of such removal, the value of the real estate, exclusive of old improvements, being presumably equal to the purchase price of the land and building plus the cost of removing the useless building."

This exception is obviously inapplicable here. The property in question was not purchased with a view of demolishing the building but with the view of using it as a theatre building, and it was so used for a number of years. The possibility of demolishing the

building was not even considered until shortly before the actual demolition in 1950, some four years after the taxpayer's acquisition of the property in question.

Some cases hold that the exception contained in the regulations is the only exception to the general rule, *Union Bed & Spring Co. v. Commissioner* (CA 7, 1930) 39 F. 2d 383; *Hotel McAllister, Inc. v. United States* (D. Fla. 1933) 3 F. Supp. 533; *Wearley v. United States* (N. D. Ohio 1943) 32 AFTR 1761, 43-2 USTC ¶9545. However, some courts have engrafted a further exception upon the general rule, holding that if a building is demolished in order to make way for the erection of a new structure, even though there was no such intent at the time that the property was acquired, the demolition loss is considered part of the cost of the new building and is to be depreciated over its life, *Commissioner v. Appleby* (CA 2, 1942) 123 F. 2d 700, *aff'g.* (1940) 41 BTA 18. This exception is likewise inapplicable here; neither the taxpayer nor its lessee has ever had any intention of replacing the old building with a new building, and in fact no such replacement has ever been made.

The third exception to the general rule applies where an old building has been demolished in order to obtain a lease, generally with the lessee's agreement to put up a new building. In these cases, the demolition loss has frequently been held to be a cost of obtaining the lease, amortizable over the life of the lease, *Young v. Commissioner* (CA 9, 1932) 59 F. 2d 691. It is this exception that the Commissioner of In-

ternal Revenue claimed was applicable here (R. 22-23), and The Tax Court also relied upon this exception although it gave other reasons for denying the claimed loss. However, as will be explained more fully below, the building was not demolished in order to secure a lease; the lease was entered into on October 6, 1949, at which time (and prior thereto) no consideration whatsoever had been given to demolishing the building.

The Tax Court states (R. 96) that a demolition loss "has been disallowed in a variety of other circumstances, where no actual loss was suffered as a result of the demolition", and then cites seven cases purportedly setting forth the "variety of other circumstances" in which a demolition loss had been disallowed. However, all seven of the cases cited are examples of situations in which, in order to obtain an advantageous lease, a lessor either demolished a building or permitted his lessee to do so, and in all of them the court (or Board of Tax Appeals) merely disallowed the claimed demolition loss on the ground that the demolition was a cost of securing the lease. Hence, unless this case falls within one of the recognized exceptions to the rule permitting deductions of demolitions, taxpayer's demolition loss constitutes a deductible loss in its fiscal year ended July 31, 1950.

II. THE TAX COURT'S REASONS FOR FAILING TO FOLLOW THE GENERAL RULE ALLOWING THE CLAIMED DEDUCTION ARE WHOLLY INADEQUATE.

The Tax Court denied the deduction in the year of demolition of the full amount of the loss on the following grounds:

1. The petitioner in fact sustained no loss since "The term of the lease extended substantially beyond the remaining useful life of the building, and * * * the lessee's obligations under the lease were in no way curtailed upon removal of the building". (R. 97.)

2. Permission to demolish the theatre was given by an agreement "that looked primarily towards the sale of the property", and "In such circumstances the only loss allowable would be one at the time of sale equal to the excess, if any, of the adjusted basis over the sales price." (R. 97.)

3. "From the lessor's point of view the building was being replaced by an advantageous lease and therefore no deductible loss is allowable * * * [since] the unrecovered cost of the razed building is to be treated as part of the cost of the lease." (R. 98.)

4. "* * * petitioner did not in fact sustain a loss as a result of the destruction of the theatre building, and * * * to allow the claimed deduction here would be to give petitioner a windfall that Congress never intended." (R. 99.)

There is no merit in any of these grounds.

A. The fact that the term of the lease was longer than the expected useful life of the building is of no importance.

The Tax Court opinion first states that since the lease of the Tivoli Theatre Building (twenty-five years) was in excess of the remaining useful life of the theatre building at the time of the lease (about sixteen years), no loss was sustained upon the demolition of the building (R. 97). The Court's view apparently is that wherever property is leased for a term longer than its expected useful life, no loss can be taken at any time on the demolition of such property.

This reasoning of The Tax Court assumes that the lessee will actually be able to pay the rent for the life of the lease, that the lease will continue for its entire term, and that no improvements could be made to the building which might lengthen its life, all of which are matters of speculation. Actually the instant lease ended within two and a half years, in September 1951 (R. 92). When a building with an expected sixteen years of remaining life is leased for twenty-five years, it is uncertain whether or not the lease will actually last that long and whether or not the building will be of any value at the termination of the lease (whether termination occurs at or prior to the end of the fixed term). Where, as here, the building is demolished because of worthlessness prior to termination of the lease, it becomes clear that the lessor will never get the building back and that he has incurred the loss at the time that the building is demolished. Certainly, the fact that if the building

had not been demolished, the lessor might or might not have recovered a building of any value at the termination of the lease is no reason to deny the deduction where the building is demolished.

Furthermore, if The Tax Court is correct in its view that where the term of a lease extends beyond the useful life of a building, the taxpayer incurs no loss on demolition of the building, it necessarily follows that the lessor in such a case would lose his right to depreciation over the useful life of the building and would be permitted only to amortize the remaining cost of the building over the term of the lease. That very argument was made by the Commissioner and rejected by the Court of Appeals for the Sixth Circuit in *Lamson Bldg. Co. v. Commissioner* (CA 6, 1944), 141 F. 2d 408. In that case, the taxpayer leased certain improved real property for a 75-year term. The useful life of the building was considerably less than the term of the lease. The Court of Appeals for the Sixth Circuit nevertheless allowed depreciation to the lessor over the shorter useful life of the improvements rather than over the 75-year term of the lease, as determined by the Commissioner.

At page 410 of the opinion the Court of Appeals stated:

> "There is intrinsic fairness in basing depreciation upon the single standard of useful life, if we are right in concluding that such standard is, under the regulations, alone applicable. Should the tenant default and the lessor repossess the property, he has not been deprived of his full measure of depreciation allowance, and in the case

> of a short term lease, the Treasury is not deprived of revenue by an inordinate depreciation rate during the term of the lease. On the other hand, if a new building replaces the old, after invested capital has been fully recovered by depreciation deductions, its value or so much of it as remains after the expiration of a long term lease, is doubtless a gain to the lessor under applicable rules."

If, as the Court of Appeals held in the *Lamson Bldg. Co.* case, a lessor is allowed depreciation on the basis of the useful life of the improvement even though it may be shorter than the term of the lease, it would certainly follow that the lessor should be allowed a loss incurred on the demolition of the improvement prior to the expiration of the term of the lease, at least where, as here, the demolition of the improvement was not contemplated when the lease was entered into.

The case of *Albert L. Rowan* (1954), 22 T.C. 865, the only one cited by The Tax Court upon this point, is obviously inapplicable here. There, the taxpayer inherited a one-third interest in property upon which a building had been constructed by the lessee under a 66-year lease, without cost to the lessor. The term of the lease extended beyond the useful life of the building. The Tax Court denied taxpayer's claimed deduction for depreciation on the building. The Tax Court pointed out that:

1. The decedent (the original lessor) had no investment in and hence no basis for the building. The

annual depreciation deductions on the cost of the building were being granted to the lessee. Granting the depreciation deduction to the taxpayer would be allowing the same deduction to two different taxpayers.

2. Upon expiration of the lease, the taxpayer would receive the land together with the building. The property might then be worth more than its value when taxpayer acquired his interest therein (the date of decedent's death). Hence, it was not clear that the taxpayer was suffering a diminution in the value of his property of the type to be recovered through a depreciation allowance.

Neither of these factors is present in this case. Here, the petitioner had an investment in and a cost basis (acquired by purchase) for the Tivoli Theatre Building. Depreciation was claimed by and allowed to the taxpayer-lessor, and the lessee had no claim thereto. There is no question here as to whether or not the *lessee* is entitled to the loss; no problem here exists as to whether allowing the deduction to the instant taxpayer would be permitting a double deduction.

With respect to the second factor relied on in the *Rowan* case, the facts of the instant case likewise differ from those of that case. Here, it was obviously impossible that the taxpayer would receive the building intact at the end of the lease; the building had been demolished, and the lessee was under no obligation to restore it or erect a new building. Here, it is unnecessary to await termination of the lease to de-

termine whether a loss was sustained by the taxpayer upon demolition of the Tivoli Theatre Building. The taxpayer clearly incurred a loss in the year of demolition, and the loss should be allowed as a deduction in that year.

B. The fact that permission to demolish the building was granted to the lessee in an option agreement is of no significance.

The second reason advanced by The Tax Court for refusing to allow the claimed deduction is that (R. 97):

> "* * * Permission to demolish the theatre building was given to the lessee in the letter agreement of April 24, 1950. That agreement was one that looked primarily towards the sale of the property. Of course, there was no assurance at that time that the sale would go through, but the option was in fact exercised and the sale did in fact take place, as contemplated, although there were modifications in some of the details. In such circumstances the only loss allowable would be one at the time of sale equal to the excess, if any, of the adjusted basis over the sales price. See Oscar K. Eysenbach, 10 B.T.A. 716, 722."

The fact that the contract which gave the lessee permission to demolish the Tivoli Theatre Building also granted it an option to purchase the underlying land and the office building has no bearing on the issue of whether a deduction should be allowed to the taxpayer as a result of the demolition of the theatre building. The Tax Court gives no explanation whatsoever of how this factor could possibly be material. The Tax Court found as a fact (R. 91) that: "When

the letter agreement of April 24, 1950, was entered into, the lessee had not determined whether he would exercise the option to purchase which was given therein." As a matter of fact, the option to purchase was not exercised by the lessee until September 27, 1951, in the taxpayer's fiscal year ended July 31, 1952, well over a year after the demolition of the building (R. 92). Hence the gain or loss on the sale of the land underlying the Tivoli Theatre Building and of the Tivoli Office Building and the land thereunder was not a closed transaction until September 1951 and the gain or loss therefrom was not includible in taxpayer's income until its fiscal year ended July 31, 1952. On the other hand, the taxpayer had irretrievably parted with the Tivoli Theatre Building when it was demolished during its fiscal year ended July 31, 1950. The Tax Court cites no authority to support the proposition that taxpayer's demolition loss incurred in its 1950 fiscal year should be postponed or held in suspense until it was determined a year and a half later whether or not the lessee would purchase the land which that building had formerly occupied, together with the adjacent Tivoli Office Building.

If The Tax Court is arguing in effect that the agreement granting the lessee permission to tear down the Theatre Building and giving him an option to purchase the remainder of the property was in essence one calling for the sale of the Theatre Building, then the loss on the Theatre Building constituted a deductible ordinary loss to the taxpayer under Section

117(j) of the Internal Revenue Code of 1939. Such loss would be deductible in taxpayer's fiscal year ended July 31, 1950, since this was a transaction independent of the option to purchase the remainder of the property, which was ultimately exercised in the taxpayer's fiscal year ended July 31, 1952. The taxpayer had a basis of $132,284.42 for the Theatre Building at the time of its demolition and it received nothing that it did not have before in return for giving the lessee permission to demolish the building.*

The only case here cited by The Tax Court—*Oscar K. Eysenbach* (1928) 10 BTA 716—is readily distinguishable from the instant case. In that case, the owners of a piece of improved real estate leased the property for a 99-year term. Under the terms of the lease, the lessee was to raze an old brick building (which had an undepreciated cost of $41,666.67) and to erect thereon a new building to cost not less than $100,000. The lessee took possession and razed the old building. He commenced erection of the new building, but after erecting part of it and having expended thereon between $57,000 and $58,000, he defaulted on

*It might be argued that the $25,000 received by the taxpayer as an additional lease deposit and as consideration for the option (R. 90-91) was also received from the lessee as consideration for the Theatre Building but in that event, the unrecovered basis for the building ($132,284.42) less the consideration given therefor ($25,000) or $107,284.42 constitutes an allowable loss to the taxpayer under Section 117(j) of the Internal Revenue Code of 1939 for its taxable year ended July 31, 1950. Taxpayer submits that the $25,000 was not consideration for the building, and that whether the transaction is considered as a sale of the building to the lessee or as a demolition loss, the full amount of the basis constitutes a deductible loss to the taxpayer in the year of sale or demolition.

the lease. The taxpayer, one of the lessors, claimed a loss upon the razing of the building. The Board of Tax Appeals denied the claimed loss. In the *Eysenbach* case, permission to raze the old building had been given to secure a lease, a factor not here present. Furthermore, the old building, with an undepreciated cost of $41,666.67, had there been replaced by a partly completed building upon which the lessee had expended over $57,000. In that case then, there was merely a substitution of assets; the old building was demolished either in return for the lease or in return for the new building which the lessee had undertaken to build. There was thus no economic or tax loss. On the other hand, in the instant case, the permission to demolish was not given in order to secure a lease; the lease had already been secured. Furthermore, no new building or other asset replaced the old building. Unlike the taxpayer in the *Eysenbach* case, the taxpayer in the instant case realized a physical and economic loss in the taxable year of demolition, namely, its fiscal year ended July 31, 1950.

C. The building in question was not demolished in order to secure a lease.

The Tax Court's third ground for disallowing the claimed deduction is that "the removal of a building in connection with obtaining a lease on the property is regarded as part of the cost of obtaining a lease." (R. 97). It is true that where an old building has been demolished in order to obtain a lease (usually with the lessee's agreement to put up a new building), the demolition loss has been held to be a cost of obtain-

ing the lease, amortizable over the life of the lease. Here, however, that exception to the general rule that demolition losses are deductible in the year of demolition is not applicable.

1. **Permission to demolish the building was given not in the original lease but in a subsequent modification.**

In the instant case, permission to demolish the building was not given to the lessee in order to secure the lease. The lease was entered into on October 6, 1949, at which time no consideration whatsoever had been given to demolishing the building (R. 88-89). Rather, it was the intention of both the lessor and the lessee that the building would be retained and converted into a garage. The refusal of the San Francisco City authorities to permit the conversion of the building into a garage in the manner planned, which occurred after the lease was entered into (R. 89), gave rise to the plan to demolish the building. The taxpayer granted the lessee permission to demolish the building by a letter agreement dated April 24, 1950, five and one-half months after the lease was entered into (R. 89-90). The original lease was in no wise contingent upon demolishing the building. Hence, it cannot be claimed that the building was voluntarily demolished in order to secure a lease, and that the undepreciated cost of the building should therefore be amortized over the term of the lease.

2. **The lease modification did not give taxpayer a more valuable leasehold.**

It has been held that where an old lease was cancelled and a wholly new lease at a higher rental en-

tered into in return for the lessor's permission to the lessee to demolish the building, the undepreciated cost of the building was not deductible in the year of demolition, but was amortizable over the term of the lease, *Myer Dana* (1934) 30 BTA 83, *acq.* XIII-1 CB 5.

However, the instant situation is wholly different. Here the demolition of the building did *not* result in the taxpayer's obtaining a longer or more favorable lease in any manner. Here no new lease was entered into. The letter agreement of April 24, 1950, under which the lessee was given the authority to demolish the Tivoli Theatre Building did not change the terms of the original lease. That agreement specifically states:

> "6. The Seller, as the lessor, expressly retains all of their [sic] rights under the aforementioned lease dated October 6, 1949, and makes no waiver of any of the conditions of said lease, including but not limited to the $10,000.00 guarantee by Mr. Herman Hertz."

The agreement of April 24, 1950, gave *to the lessee* an option to purchase the entire Tivoli property (including both the Theatre Building and the Office Building). The granting of this option was a detriment and not a benefit to the taxpayer and cannot be said to be an asset received by the taxpayer in exchange for its permission to demolish the property. The lessee was given a one year period in which to exercise the option, and the agreement of April 24, 1950, called for the lessee to deposit $25,000 with the

taxpayer. This sum of $25,000 was the only consideration which can conceivably be argued was received by the taxpayer for granting the permission to demolish. However, this amount of $25,000 did not become the property of the taxpayer outright in exchange for the permission to demolish; rather, it was to be applied against the purchase price if the option was exercised, and if the option was not exercised it was to constitute merely an additional lease deposit.*

Again, it should be borne in mind that the general rule is that demolition losses are deductible, and that the doctrine that such losses are not deductible when incurred to secure a lease is an exception to the general rule. The basis for this exception is that there has been a substitution of assets (a leasehold for a building) rather than a demolition of the building without receiving any consideration therefor. The Courts have clearly stated that such is the basis for the exception. In *Anahama Realty Corp. v. Commissioner* (CA 2, 1930) 42 F. 2d 128, cert. den. 282 US 854, for example, the Court said:

> "* * * The removal of the buildings was a part of the cost of acquiring the lease and with it came the obligation of the tenant to pay the rent. The cost of acquiring an asset cannot be regarded as deductible as a loss or business expense for the year in which it is paid or incurred. * * * There

*Even if it could be said that the $25,000 was received by the taxpayer in exchange for its permission to the lessee to demolish the Tivoli Theatre Building, that transaction would certainly constitute a taxable event upon which, under Section 117(j) of the Internal Revenue Code of 1939, an ordinary loss would be allowable to the petitioner which would enter into the net operating loss carry-back.

was a substitution of assets rather than a loss sustained in the destruction of the buildings."

In *Young v. Commissioner* (CA 9, 1932) 59 F. 2d 691, cert. den. 287 US 632, this Court said:

> "* * * On the other hand, where he [the lessor] finds it advantageous to remove substantial buildings in order to secure a lease which will result in his having erected on his property a new building, without money outlay on his part for its construction, and to have assured a large rental income for a long term of years, it would seem just and reasonable that the value of the buildings removed be charged as a contribution to the cost of securing his lease, and as a part of the investment then made for that purpose."

See also, *Smith Real Estate Co. v. Page* (CA 1, 1933) 67 F. 2d 462 (discussed *infra* pages [36-37]).

In the instant case, we do not have the substitution of assets which is necessary to deny the deduction of the demolition loss and require amortization over the term of the lease.

The situation is analogous to that of repairs. In the words of the regulations "* * * incidental repairs which neither materially add to the value of the property nor appreciably prolong its life, * * *" may be deducted as an expense, whereas if repairs arrest deterioration and appreciably prolong the life of the property, they must be capitalized. Treasury Regulations 111, Section 29.23(a)-4.

So here if the demolition of the building resulted in obtaining a longer lease or a lease for a greater rental,

there would be ground for arguing that the undepreciated cost of the building demolished could not be deducted but would have to be capitalized. However, in the instant case the demolition of the building did *not* result in increased rentals or an increased term of the lease. Hence, the full amount of demolition loss should, under the general rule of the regulations and cases, be allowed as a deduction in the year of demolition.

3. Where, after a lease has been entered into, it is necessary to demolish or dispose of property of the lessor, any loss incurred therein is deductible.

A distinction is drawn in the cases between those instances in which property is demolished in order to secure a lease (in which instances the loss may not be allowable) and those in which after a lease is entered into, events unanticipated at the time of the lease cause the property to be demolished or sold at a loss. In the latter situation, the loss constitutes an allowable deduction.

In *Commissioner v. Providence, Warren and Bristol R. R. Co.* (CA 2, 1935) 74 F. 2d 714 the difference between the cost of electric generators and the price for which they were sold at a loss in 1926 by the assignee of the taxpayer's lessee was held deductible as a loss to the taxpayer-lessor for that year.

In the *Providence* case, a provision in the lease permitted the lessee to dispose of "such portions and parcels of the real estate and property * * * not required by the lessee for railroad purposes." Under this provision, the lessee was accountable to the lessor-taxpayer only for the proceeds, if any, from the sale

or other disposition of the property. The Court held that when the generators were sold, the lessor was no longer protected by the general provision in the lease requiring the lessee to return the value of all property received in full, and the loss determined by the sale became the lessor's loss.

The *Providence* case was followed by the Board of Tax Appeals in *Mississippi River & Bonne Terre Railway* (1939) 39 BTA 995, where the facts were the same in all material respects. These two cases are in fact weaker than the instant case. There, while the exact property which might be sold by lessee was not known, it was at least contemplated that certain property might become valueless for railroad purposes. It could therefore be argued that the permission to dispose of such property was in effect given in consideration for the lease, and hence that the losses therefrom should be amortized over the period of the lease. Here, however, the parties did not realize when the lease was executed that the building would become valueless. Hence, it is even clearer that the claimed loss is allowable.

In *Terre Haute Electric Co., Inc. v. Commissioner* (CA 7, 1938) 96 F. 2d 383, the taxpayer in 1907 leased its property under a long-term lease. The property leased included interurban traction lines. In 1931 on the joint application of the taxpayer and its lessee, the Indiana Public Service Commission approved the abandonment of two lines which were wholly obsolete for the purposes of railway operation. The lease provided that the lessee would replace any property

which became worn out or was sold or otherwise disposed of.

The Court allowed to the lessor a loss for the abandonment of the two interurban lines, stating:

> "Thus the theory upon which a lessor, under a lease such as here involved, has been denied the right to claim deduction for depreciation, is, that by the terms of the lease the lessee has assumed the obligation of maintaining and operating the property in such a manner that it will be returned to the lessor at the expiration of the lease in as good condition as at the beginning, and, therefore, the lessor has sustained no loss. In this case, as we have pointed out, the petitioner, as lessor, has sustained no loss either by depreciation or obsolescence as that burden was assumed by the lessee and protects petitioner during the life of the lease.
>
> "We are unable to see any reason, however, why the contracting parties could not cancel a lease of this character, or any other character for that matter, and relieve themselves of the obligations incurred thereby, provided, of course, it was not to the injury of third parties. Here, apparently, the parties to the lease in 1931, agreed that two of the lines in question might be abandoned, and by proper state authority, were directed to be abandoned. Under such circumstances, how can it be said that the lessor is protected from the loss thus sustained? Certainly, thereafter, the lessee would be under no obligation to restore the abandoned property. It seems clear to us that petitioner sustained a deductible loss for the year 1931, on account of the two interurban railways abandoned that year * * *"

The facts of the *Terre Haute Electric Co.* case are substantially the same as those in the instant case. In neither case at the time that the lease was executed was there any intention of abandoning or demolishing any of the leased property; subsequent events in both instances made such abandonment or demolition advisable. In the instant case, it was necessary to modify the original lease in order to give the lessee the permission to demolish the building; in the *Terre Haute* case the Court considered the joint application of the lessor and the lessee in applying for the abandonment of the properties involved to constitute a modification of the lease provision which required the lessee to return the property in the condition in which it acquired it. The claimed loss should be allowed in this case just as the abandonment loss was allowed in the *Terre Haute Electric Co.* case.

4. The building in question became economically worthless during the taxpayer's fiscal year ended July 31, 1950.

In the instant case, the building in question became economically valueless during the taxpayer's fiscal year ended July 31, 1950. The building was considered useful when the lease was entered into on October 6, 1949, but later in the same fiscal year after the City refused permission to convert it into a garage in the manner contemplated by the lessee it became valueless and unsuitable for any purpose whatsoever. It was demolished not in order to secure a new lease or a new building, but because it was worthless. Under such circumstances, the demolition loss is deductible in full.

In *Commissioner v. Appleby* (CA 2, 1941) 123 F. 2d 700, *aff'g* (1940) 41 BTA 18, the property in question was inherited in 1913, and the building was demolished and a new one built in 1917. The new building was condemned in 1933 and the taxpayers were upheld by both the Board of Tax Appeals and the Circuit Court in including in their basis for the new building the undepreciated value of the old building, since the old building had been demolished with the purpose of constructing a new building. The Court of Appeals said by way of dictum:

> "* * * Losses are recognized only when they result from a closed transaction. *If a building is demolished because unsuitable for further use, the transaction with respect to the building is closed and the taxpayer may take his loss;* but if the purpose of demolition is to make way for the erection of a new structure, the result is merely to substitute a more valuable asset for the less valuable and the loss from demolition may reasonably be considered as part of the cost of the new asset and to be depreciated during its life, as is a broker's commission for negotiating a lease." [Emphasis supplied.]

In *Alice V. Gordon* (1942) 46 BTA 1201, *aff'd* (CA 4, 1943) 134 F. 2d 685, the Board of Tax Appeals found that certain improved real property in which the taxpayer had an undivided interest became worthless in 1937 and accordingly allowed her to deduct the amount of the loss in that year even though she retained legal title to the property throughout the year. The Board said:

"* * * it is clear that in the year 1937 petitioner's interest in the real property under consideration became worthless; that it was then properly deductible as a loss; and that the action by respondent in disallowing it must be disapproved. In *Young v. Commissioner* (CA 9, 1932) 59 F. 2d 691, *cert. den.* 287 US 652, this Court said:

"* * * There can be no question that where a land owner finds it necessary to remove structures unsuitable for further use, he may have a deduction from gross income for the loss."

Compare also *Jack M. Chesbro* (1953) 21 TC 123, *aff'd on other issues* (CA 2, 1955) .....F. 2d ..... The regulations, too, approve this rule. Regulations 111, Section 29.23(e)-3 provides in part as follows:

"LOSS OF USEFUL VALUE. — When, through some change in business conditions, the usefulness in the business of some or all of the assets is suddenly terminated, so that the taxpayer discontinues the business or discards such assets permanently from use in such business, he may claim as a loss for the year in which he takes such action the difference between the basis (adjusted as provided in section 113(b) and sections 29.113(e)(14)-1 and 29.113(b)(1)-1 to 29.113(b)(3)-2, inclusive) and the salvage value of the property. This exception to the rule requiring a sale or other disposition of property in order to establish a loss requires proof of some unforeseen cause by reason of which the property has been prematurely discarded, as, for example, where an increase in the cost or change in the manufacture of any product makes it necessary to

abandon such manufacture, to which special machinery is exclusively devoted, or where new legislation directly or indirectly makes the continued profitable use of the property impossible. This exception does not extend to a case where the useful life of property terminates solely as a result of those gradual processes for which depreciation allowances are authorized. It does not apply to inventories. The exception applies to buildings only when they are permanently abandoned or permanently devoted to a radically different use, and to machinery only when its use as such is permanently abandoned. * * *"

The evidence shows that there was no salvage value in the instant case (R. 124).

The facts in *Work Clothing Corp.* (1949) 8 TCM 506 are very similar to those of the instant case. There, taxpayer acquired certain improved property with several old brick buildings thereon for the purpose of converting the existing structures on the property into a public market. After acquisition of the property, the original plan proved impracticable and taxpayer decided to turn a portion of the property into a parking lot, which required demolition of some of the buildings. It was held that taxpayer was entitled to deduct the cost of the buildings demolished less depreciation and less salvage. The Court said:

"The record clearly shows that the property was bought by the petitioner for the purpose of converting it into a public market; the petitioner at that time had no intention of demolishing any of the buildings; efforts were made to follow out

> the original purpose; it was later found that the original plans were not feasible; and the petitioner was required to change its plans and adapt the property to another purpose which required demolition of some of the buildings. It follows that the petitioner is entitled to deduct the cost of the buildings, less depreciation up to the time when demolition was begun and less salvage."

Even assuming that the amendment of the lease by the letter agreement of April 24, 1950, is considered as a new lease secured by granting permission to the lessee to demolish the building, nevertheless, under the facts of the instant case, amortization of the remaining cost of the building would not be required, but rather such remaining cost would be allowable as an ordinary deduction. In *Smith Real Estate Co. v. Page* (CA 1, 1933) 67 F. 2d 462, the Court said:

> "The correct conclusion depends, as it seems to us, on the facts in the particular case. If the existing buildings had become valueless at the time of the lease, it is probably false to the fact to say that the lessee paid, in any form or guise, compensation for them. Under such circumstances, the loss on the buildings had already occurred when the lease was made. It was not yet deductible for income tax purposes because no steps had been taken to fix it. But the transfer of the buildings to the lessee would have that effect, and would make the loss immediately deductible. On the other hand, if the buildings had value at the time of the lease, such value was surrendered to the lessee and was presumably compensated by the provisions in the lease. * * *"

The Court in the *Smith* case held that the taxpayer had not proved that the property concerned had no value at the time of the lease and demolition. Accordingly, it held that the loss was not deductible, although stating that the loss would have been deductible had the fact that the property concerned had no value been satisfactorily established. Worthlessness is clearly evident in the instant case; when, shortly prior to the lease modification in question, the City and County of San Francisco refused to approve the plans for the conversion of the property involved into a five-story garage, the building became worthless and was so considered by both the taxpayer and the lessee (R. 123, 138). Thus, even if the modification of the lease which took place on April 24, 1950, were considered the same as entering into a new lease and acquiring for the taxpayer an asset in substitution for the building which the lessor had permitted the lessee to demolish, nevertheless, since the building was obsolescent and had no value whatsoever at the time of the lease modification, under the *Smith Real Estate Co.* case, the loss is deductible by taxpayer in its fiscal year ending July 31, 1950.

D. To allow the claimed deduction would not give the taxpayer a "windfall" unintended by Congress.

At the end of its opinion, The Tax Court states (R. 98-99):

> "The facts in this case are unusual, but from whatever point of view the problem is studied, we are led inevitably to the conclusion that petitioner did not in fact sustain a loss as a result of the

> destruction of the theatre building, and that to allow the claimed deduction here would be to give petitioner a windfall that Congress never intended."

The Tax Court's conclusion that the taxpayer did not sustain a loss is erroneous and its conclusion that to allow a deduction would result in a "windfall" to the taxpayer is equally erroneous. At the time of its demolition, the Tivoli Theatre Building had an unrecovered cost or basis of $132,284.42 (R. 92). After the demolition, the taxpayer had no building. Plainly, from an every day "common sense" viewpoint, taxpayer sustained a loss upon the demolition of the building. The question in this case is not whether the $132,284.42 unrecovered cost or basis of the Tivoli Theatre building at the time of its demolition may be deducted at all; the only question is whether this amount may be deducted in the year of demolition, as the taxpayer maintains, or whether it must be spread over the term of the lease, as the Commissioner contends.

Neither the rule sought by the taxpayer nor the rule contended for by the Commissioner and approved by The Tax Court results in a "windfall" to either taxpayers generally or the Commissioner. The effect of either rule in any particular case depends on the income of the particular taxpayer and the rates of taxation during the years of the lease in question. The effect of either rule on the revenue is unpredictable. Hence there is no reason for stating that allowing the

deduction in the manner claimed by the taxpayer would give it a "windfall".

Nor can it be said that Congress intended to deny deductions of the sort here in question. On the contrary, Section 23(f) of the Internal Revenue Code of 1939 specifically permits the deduction by a corporation of "losses sustained during the taxable year and not compensated for by insurance or otherwise."

Throughout its opinion, The Tax Court expresses its doubt that the taxpayer here actually sustained a loss on the demolition of the building. For example, it remarks that (R. 98):

> "* * * Indeed, the razing of the building may well have constituted a benefit rather than a detriment to petitioner. The evidence suggests that the building was obsolete or obsolescent, and the rather substantial cost of demolition was borne by the lessee."

It also states that (R. 98-99):

> "* * * we are led inevitably to the conclusion that petitioner did not in fact sustain a loss as a result of the destruction of the theatre building * * *"

The Tax Court overlooks the distinction between an economic loss and a realizable taxable loss. For example, *A* purchases certain stock in 1954 for $100,000. On January 1, 1956 this stock is worth only $1,000, and *A* sells it for that amount. In a sense, he has incurred no economic loss by reason of the sale. Immediately before the sale he had stock worth $1,000;

immediately thereafter he has $1,000 in cash. He is no richer and no poorer. Actually, his economic loss has occurred in the preceding years as the stock depreciated in value. Yet, for income tax purposes, his loss is not "realized" until the stock is sold or becomes completely worthless. And the loss, for income tax purposes, is not deductible until 1956.

Here, too, the economic loss may have occurred before the actual demolition of the building; indeed if the building had any value, the taxpayer would not have so readily consented to its demolition. The taxpayer submits, however, that for income tax purposes, his loss was realized and incurred in its fiscal year ended July 31, 1950, the year in which the building became worthless, in which the lessee was given permission to demolish it, and in which the actual demolition occurred.

The Tax Court suggests (R. 98), that "the razing of the building may well have constituted a benefit rather than a detriment to petitioner". However, this does not prevent the deduction of the loss. If a taxpayer purchases a business and consistently loses money on it, his sale of that business at a loss might well be an economic benefit to him. Yet, the excess of his adjusted basis (cost) over the proceeds of the sale would nonetheless certainly constitute a deductible loss to him for income tax purposes. Similarly, here it is immaterial whether the taxpayer was economically better off before or after the demolition of the building. Before the demolition, the taxpayer had a building with an undepreciated cost basis

of $132,284.42; after the demolition, the taxpayer had no building and had no asset which it had not had prior to demolition of the building. We submit that under such circumstances, it is clear that taxpayer's loss was realized for income tax purposes in its fiscal year ended July 31, 1950 and that the claimed loss should be allowed in full as a deduction in that fiscal year.

CONCLUSION.

The decision of The Tax Court is erroneous and should be reversed.

Dated, San Francisco, California,
January 24, 1956.

Respectfully submitted,
SAMUEL TAYLOR,
WALTER G. SCHWARTZ,
Counsel for Petitioner.

TAYLOR & SCHWARTZ,
Of Counsel.

(Appendix Follows.)

Appendix.

Appendix

INTERNAL REVENUE CODE OF 1939.

Section 23. *Deductions from Gross Income.*

In computing net income there shall be allowed as deductions: * * *

(f) *Losses By Corporations.*—In the case of a corporation, losses sustained during the taxable year and not compensated for by insurance or otherwise.

Section 117(j). *Gains and Losses From Involuntary Conversion and From the Sale or Exchange of Certain Property Used in the Trade or Business.*—*

(1) Definition of Property Use in the Trade or Business.—For the purposes of this subsection, the term "property used in the trade or business" means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(l), held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

(2) General Rule.—If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion

*Section 117(j) is quoted in the form in which it existed in the taxable year involved in this proceeding.

(as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. For the purposes of this paragraph:

(A) In determining under this paragraph whether gains exceed losses, the gains and losses described therein shall be included only if and to the extent taken into account in computing net income, except that subsections (b) and (d) shall not apply.

(B) Losses upon the destruction in whole or in part, theft or seizure, or requisition or condemnation of property used in the trade or business or capital assets held for more than 6 months shall be considered losses from a compulsory or involuntary conversion.

TREASURY DEPARTMENT REGULATIONS 111.

Sec. 29.23(f)-1. *Losses by Corporations.* Losses sustained by domestic corporations during the taxable year and not compensated for by insurance or otherwise are deductible insofar as not prohibited or limited by sections 23(g), 23(h), 24(b), 112, 117, 118,

and 251. The provisions of sections 29.23(e) to 29.23(e)-5, inclusive, and section 29.23(i)-1 are in general applicable to corporations as well as individuals. See section 232 as to deductions by foreign corporations. For special provisions with respect to war losses, see section 127.

Sec. 29.23(e)-2. *Voluntary removal of buildings.* Loss due to the voluntary removal or demolition of old buildings, the scrapping of old machinery, equipment, etc., incident to renewals and replacements is deductible from gross income. When a taxpayer buys real estate upon which is located a building, which he proceeds to raze with a view to erecting thereon another building, it will be considered that the taxpayer has sustained no deductible expense on account of the cost of such removal, the value of the real estate, exclusive of old improvements, being presumably equal to the purchase price of the land and building plus the cost of removing the useless building.

Sec. 29.23(e)-3. *Loss of useful value.*—When, through some change in business conditions, the usefulness in the business of some or all of the assets is suddenly terminated, so that the taxpayer discontinues the business or discards such assets permanently from use in such business, he may claim as a loss for the year in which he takes such action the difference between the basis (adjusted as provided in section 113(b) and sections 29.113(a)(14)-1 and 29.113(b)(1)-1 to 29.113(b)(3)-2, inclusive) and the salvage value of the property. This exception to the rule requiring a sale or other disposition of prop-

erty in order to establish a loss requires proof of some unforeseen cause by reason of which the property has been prematurely discarded, as, for example, where an increase in the cost or change in the manufacture of any product makes it necessary to abandon such manufacture, to which special machinery is exclusively devoted, or where new legislation directly or indirectly makes the continued profitable use of the property impossible. This exception does not extend to a case where the useful life of property terminates solely as a result of those gradual processes for which depreciation allowances are authorized. It does not apply to inventories. The exception applies to buildings only when they are permanently abandoned or permanently devoted to a radically different use, and to machinery only when its use as such is permanently abandoned. Any loss to be deductible under this exception must be fully explained in the return of income. The limitations provided in section 117 with respect to the sale or exchange of capital assets have no application to losses due to the discarding of capital assets.

If the depreciable assets of a taxpayer consists of more than one item and depreciation, whether in respect of items or groups of items, is based upon the average lives of such assets, losses claimed on the normal retirement of such assets are not allowable, inasmuch as the use of an average rate contemplates a normal retirement of assets both before and after the average life has been reached and there is, therefore, no possibility of ascertaining any actual loss under

such circumstances until all assets contained in the group have been retired. In order to account properly for such retirement the entire cost or other basis of assets retired, adjusted for salvage, will be charged to the depreciation reserve account, which will enable the full cost or other basis of the property to be recovered.

In cases in which depreciable property is disposed of due to causes other than exhaustion, wear and tear, and normal obsolescence, such as casualty, obsolescence other than normal, or sale, a deduction for the difference between the basis of the property (adjusted as provided in section 113(b) and sections 29.113(a)(14)-1, and 29.113(b)(1)-1 to 29.113(b)(3)-2, inclusive) and its salvage value and/or amount realized upon its disposition may be allowed subject to the limitations provided in the Internal Revenue Code upon deductions for losses, but only if it is clearly evident that such disposition was not contemplated in the rate of depreciation.

In the case of classified accounts, if it is the consistent practice of the taxpayer to base the rate of depreciation on the expected life of the longest lived asset contained in the account, or in the case of single item accounts if the rate of depreciation is based on the maximum expected life of the asset, a deduction for the basis of the asset (adjusted as provided in section 113(b) and sections 29.113(a)(14)-1 and 29.113(b)(1)-1 to 29.113(b)(3)-2, inclusive) less its salvage value is allowable upon its retirement. (See sections 29.23(l)-1 to 29.23(l)-10, inclusive.)

No. 14822

In the United States Court of Appeals for the Ninth Circuit

BLUMENFELD ENTERPRISES, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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INDEX

CITATIONS

Cases:

Cases—Continued

Statute:

Miscellaneous:

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 85-99) are reported at 23 T. C. 665.

JURISDICTION

This petition for review (R. 100-101) involves income taxes for taxpayer's taxable year ended July 31, 1948, in the amount of $31,405.31. On December 12, 1951, the Commissioner of Internal Revenue mailed to taxpayer a notice of deficiency in the amount of $31,710.66. (R. 8-12.) On February 25, 1952 (R. 1), taxpayer filed a timely petition with the Tax Court for a redetermination of that deficiency under the provisions of Section

272 of the Internal Revenue Code of 1939, and on March 16, 1954 (R. 2), filed an amended petition for such redetermination (R. 4-8). The decision of the Tax Court sustaining a deficiency of $31,405.31 was entered on March 23, 1955. (R. 99.) The case is brought to this Court by petition for review filed June 15, 1955. (R. 100-101.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

Whether the Tax Court erred in determining that taxpayer did not sustain a loss on the voluntary demolition of its theatre building in 1950 under Section 23(f) of the Internal Revenue Code of 1939.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(f) *Losses by Corporations.*—In the case of a corporation, losses sustained during the taxable year and not compensated for by insurance or otherwise.

* * * * *

(26 U. S. C. 1952 ed., Sec. 23.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.23(e)-2. *Voluntary Removal of Buildings.*—Loss due to the voluntary removal or demo-

lition of old buildings, the scrapping of old machinery, equipment, etc., incident to renewals and replacements is deductible from gross income. When a taxpayer buys real estate upon which is located a building, which he proceeds to raze with a view to erecting thereon another building, it will be considered that the taxpayer has sustained no deductible loss by reason of the demolition of the old building, and no deductible expense on account of the cost of such removal, the value of the real estate, exclusive of old improvements, being presumably equal to the purchase price of the land and building plus the cost of removing the useless building.

STATEMENT

The facts, as stipulated, as developed by taxpayer's witnesses, and as found by the Tax Court, may be summarized as follows (R. 86-93):

Taxpayer owns and operates theatres and other businesses. On or about March 10, 1946, taxpayer purchased the fee interest in the so-called Tivoli property in San Francisco, which consisted of two adjacent, but separate, buildings. One of the buildings was known as the Tivoli Theatre Building, and the other as the Tivoli Office Building. The Theatre Building was constructed in 1911. It had once been an opera house and a famous theatrical landmark in San Francisco. When taxpayer acquired the property in 1946 that building had a remaining useful life of twenty years. During the period from February 10, 1946, to March 2, 1946, the Theatre Building was used for legitimate stage performances. From March 30, 1946, to June 2, 1947, it was used for the presentation of motion pictures. By 1947, the district in which the theatre was located was

no longer a desirable theatrical district; there were many bars in the area, and it had become a "tenderloin" district. Its location was away from the main theatre and entertainment districts. From June 2, 1947, until October 6, 1949, the theatre was closed except for one three-day period in 1948 when it was rented for an outside theatrical showing. Taxpayer had closed the theatre in 1947 because it was losing money on the operation and found it economically impractical to keep it running. Taxpayer thereafter had no intention of using the property as a theatre again. (R. 86-87.)

The Tivoli Office Building from the date of its acquisition by taxpayer has been used as an office building, and a portion of the ground floor has been occupied by a cocktail lounge and bar. (R. 87.)

Shortly prior to October 6, 1949, taxpayer had negotiations with representatives of a prospective lessee of the Theatre Building, looking towards the conversion of the building for garage and parking purposes. (R. 87.) Those representatives were Herman Hertz, a brother-in-law of the lessee (R. 129, 132) and M. L. Rose, a real estate broker (R. 137). The negotiations were for the specific purpose of converting the building into a five-story garage on the assumption by the lessee that the cost would be between $45,000 and $50,000. (R. 114,134,137.) As a result of these negotiations, taxpayer, on October 6, 1949, as lessor, and Harry Morofsky, as lessee, executed a lease of the Theatre Building for a term of twenty-five years and an aggregate rental of $420,000; in addition, the lessee agreed to pay all real estate taxes and charges levied against the property. Although the term of the lease was to start May 1, 1950, the lessee was allowed to enter immediately for the purpose of beginning the necessary alterations. The speci-

fied rental was to be paid at the rate of $1,250 per month for the first ten years, and $1,500 per month for the last fifteen years. (R. 87-88.) Performance of the conditions of the lease by the lessee for two years was guaranteed by Herman Hertz, the guarantee being limited to a total of $10,000. (R. 50-51.) The lease specifically limited the use of the property for the purpose of conducting the following business (R. 88):

> A garage and storage and offices for the use of the Lessee in connection with garage operations, or concessions under-let hereunder to be used with office space, as hereinafter provided.

In the lease Morofsky, the lessee, specifically undertook to remodel the building so as to make it suitable for conducting a garage and car storage business with such offices as might be necessary for the conduct of the business. For this purpose taxpayer, as lessor, granted the lessee authority to construct as many floors as the lessee might find necessary but the lessee was obligated as a minimum to construct a basement floor and a first and second floor above that. (R. 88.)

Under the lease the lessee was required to submit to taxpayer for its approval plans for the remodeling of the building. In the latter part of 1949, preliminary and final plans for a five-story garage were prepared by the lessee at an expense of approximately $4,000, and were approved by taxpayer. (R. 88.)

At the time the lease was entered into on October 6, 1949, neither taxpayer nor the lessee had any intention of demolishing the Theatre Building. (R. 88-89.)

In November 1949, the lessee submitted to the proper authorities of the City and County of San Francisco

his plans for remodeling the Tivoli Theatre Building so as to convert the building to a five-story parking garage. The city and county authorities declined to approve the plans as submitted and insisted upon costly revisions involving a substantial increase in the thickness of the walls by the addition of concrete, the inclusion of additional supporting members, and changes in the plans for the ramps, all of such a nature as to reduce substantially the amount and convenient usability of floor space for parking purposes and to render it economically unfeasible to use the Theatre Building for the purpose of a parking garage. (R. 89.)

The estimated cost of the remodeling, if performed in accordance with the plans required by the City and County of San Francisco, was in excess of $125,000. It was not economically feasible to incur such cost, and the plan for remodeling the Theatre Building for purposes of a parking and storage garage therefore had to be abandoned. (R. 89.)

After the defeat of plan for remodeling the building, the lessee consulted another engineer who advised that the Theatre Building be demolished and that the area thus released be used for surface parking. (R. 89.)

On April 24, 1950, the lessor and lessee entered into a letter agreement looking towards the purchase of the entire Tivoli property by the lessee, and providing in any event for permission to the lessee to demolish the Theatre Building. (R. 89-90) That agreement reads in part as follows (R. 52-54, 90-91):

1. The sale price is to be $350,000.00.
2. The sum of $25,000.00 is to accompany the

sale agreement, in consideration for which the Purchaser shall have an option to conclude the deal within one (1) year.

* * * * *

5. In the event the Purchaser does not conclude the purchase of the property within one (1) year, the $25,000.00 mentioned under No. 2 above shall remain with the Seller as additional lease deposit under that certain lease dated the 6th day of October, 1949, between Blumenfeld Enterprises, Inc., as lessors, and Harry Morofsky, as lessee, and shall be deducted from rentals at the end of the lease term. In consideration of this additional lease deposit, the lessors grant to the lessee permission to demolish the rear portion of the premises [Theatre Building] for the purposes conforming to said lease and further provided the lessee shall furnish to the lessor modified plans showing the proposed basement and ground floor development and shall secure from the lessors written permission for said development. All of the cost of demolishing and improving shall be at the lessee's sole cost and expense.

6. The Seller, as the lessor, expressly retains all of their rights under the aforementioned lease dated October 6, 1949, and makes no waiver of any of the conditions of said lease, including but not limited to the $10,000 guarantee by Mr. Herman Hertz.

7. In the event the Purchaser exercises his option to purchase within the one (1) year period,

then he shall be given credit by the Seller for the net gross profit from the operation of all of the premises in the interim period. The Seller shall deduct from said rentals, taxes, insurance, utility costs and all other legitimate items of expense.

The letter agreement also contained a statement that it sets forth only the "basic agreement" and that both parties would thereafter execute a "formal sales agreement." The $25,000 payment, referred to in paragraph "2" above, was in fact made on May 1, 1950. When the letter agreement of April 24, 1950, was entered into, the lessee had not determined whether he would exercise the option to purchase which was given therein. (R. 91.)

The "formal" agreement contemplated by the parties was executed on February 23, 1951. By its terms the time for exercise of the lessee's option was extended to expire on October 1, 1951, and the lessee was expressly required, notwithstanding anything in the lease of October 6, 1949, to the contrary, to clear the portion of the property formerly occupied by the theatre. The lessee was also expressly authorized to use the "premises and area for parking lot purposes by erecting a ramp for ingress and egress therefrom through the old entrance to the Tivoli Theatre." Pursuant to permission granted by the lessor in paragraph "5" of the letter agreement of April 24, 1950, the lessee had already demolished the Theatre Building on or about May 1, 1950 prior to the end of taxpayer's fiscal year ended July 31, 1950. (R. 91.)

There was at no time any understanding or plan, either by the taxpayer or the lessee, to construct a

new building on the theatre property, and no building has ever been constructed thereon. (R. 92.)

On September 27, 1951, Harry Morofsky exercised the option granted by the agreements of April 24, 1950, and February 23, 1951, to purchase the Tivoli property, and on November 7, 1951, assigned his rights thereunder to the Hertz Shoe Clinic, Inc., a corporation. That corporation is now the owner of the Tivoli property. (R. 92.)

Taxpayer has claimed in its returns, and the Commissioner has allowed, depreciation on the Tivoli Theatre and Office Buildings on the basis of a remaining life of twenty years from the date of its acquisition of the fee interest therein (March 10, 1946). (R. 92.)

In its income tax return for its fiscal year ended July 31, 1950 taxpayer claimed as a deduction an abandonment loss on the demolition of the Tivoli Theatre Building in the amount of $154,226.34 [1] representing the undepreciated balance of the cost of that building, as shown on taxpayer's books, resulting in a net operating loss of $82,818.32 for its fiscal year ended July 31, 1950. Taxpayer claimed a net operating loss carry-back of $82,818.32 from its fiscal year ended July 31, 1950, to its fiscal year ended July 31, 1948, and made application for a tentative carry-back adjustment under Section 3780 of the Internal Revenue Code of 1939. A tentative allowance was made to taxpayer under this section in the amount of $30,803.55. (R. 92-93.)

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[1] It is stipulated that the total unrecovered cost of the Theatre Building and improvements was $132,284.42.

In his determination of taxpayer's deficiency for the fiscal year ended July 31, 1950, the Commissioner disallowed the deduction claimed upon the demolition of the Tivoli Theatre Building, and in his notice of deficiency to taxpayer for its fiscal year ended July 31, 1948, has not allowed the net operating loss deduction claimed by taxpayer. (R. 93.)

SUMMARY OF ARGUMENT

Under Section 23(f) of the Internal Revenue Code of 1939, corporations are allowed deductions from taxable income for losses "sustained during the taxable year" and not compensated for by insurance "or otherwise." It is well settled that no such loss is sustained by the owner when a building is demolished by him or by the lessee in connection with obtaining a lease of the property.

Instead the unrecovered cost of the building is regarded as an expense of securing the lease, to be amortized, like other such expenses, over the term of the lease. Although the owner may no longer have the building, the lease itself is regarded as compensation or as a substitution of a new asset for the old.

The facts in the present case may be considered from several angles. If the original lease agreement of October 6, 1949, be considered as remaining in full force, then there was no loss to taxpayer on demolition of the building, the obligations of the lessee continuing undiminished, and the lease having a longer term than the estimated useful life of the building. Taxpayer would have received no asset at the end of the lease. If the agreement of April 24, 1950, is regarded as part of a sale agreement, the unrecovered cost of the building is merely to be considered a part of the

basis for determining gain or loss when the sale was consummated.

The facts of this case, however, most reasonably fall into the pattern of a lease agreement made in its final form on April 24, 1950. So viewed, they clearly call into play the principle that the demolition of the building was in exchange for the acquisition of that lease and that accordingly no loss was sustained.

ARGUMENT

I

Taxpayer Sustained No Loss Uncompensated for by Insurance or Otherwise on the Demolition of Its Building

Under Section 23(f) of the Internal Revenue Code *(supra)*, corporations are allowed deductions from taxable income for losses "sustained during the taxable year" and not compensated for by insurance "or otherwise." Included in such losses, provided they are in fact sustained during the year and are not compensated for, are losses due to the demolition of buildings. *Union Bed & Spring Co.* v. *Commissioner,* 39 F. 2d 383 (C.A. 7th); *Helvering* v. *Gordon,* 134 F. 2d 685 (C.A. 4th); *Hotel McAllister* v. *United States,* 3 F. Supp. 533 (S.D. Fla.); *Parma Co.* v. *Commissioner,* 18 B.T.A. 429.

Where there has been an accidental destruction of buildings, there is usually no question that a loss has been sustained. Where, however, there is a voluntary demolition of a building, it is necessary to look into the surrounding circumstances more closely to determine whether a loss has actually been sustained and if so, whether it has been compensated for.

For example, if a purchaser of improved property razes the building for the purpose of erecting a new

building, he has sustained no loss by the razing of the old building. The cost of razing is a part of the cost of preparing the site of the new building, and, as is done by Section 29.23(e)-2 of Treasury Regulation 111, *supra,* it may be assumed that he paid less for the real estate because of the need to get rid of the building which was worthless for his purposes. The fact that the building may have had some value for other purposes, or that it may have had an unrecovered basis for tax purposes does not mean that a loss has been sustained, and does not justify isolating the destruction of the building from the entire context of the transaction for tax purposes.[2] *Providence Journal Co.* v. *Broderick,* 104 F. 2d 614 (C.A. 1st). Closely similar is the situation where the purchaser of an orchard unsuccessfully claims a deduction for the destruction of apple and pear trees, when his intention at the time of purchase is to clear the land for the growing of lettuce. *Eaton* v. *Commissioner,* 81 F. 2d 332, on second appeal, 95 F. 2d 628 (C.A. 9th).

Similarly, where the demolition is voluntary and in connection with a lease, the entire transaction must be looked at to determine whether a loss has in fact been realized and whether there has been compensation for the loss. It has long been settled that where the owner demolishes buildings in order to lease land to a tenant who is to erect new buildings, there is no uncompensated loss. The owners, far from sustaining a loss, have "added to their assets, or substituted property for another form of capital assets." *Young* v. *Commis-*

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[2] As taxpayer correctly points out (Br. 13-14), the present case is not one where the purchaser is claiming a loss. The foregoing example is merely illustrative of the general principle.

sioner, 59 F. 2d 691, 692 (C.A. 9th), certiorari denied, 287 U.S. 652.[3] The lease is a compensating value for the loss of the building, or "a substitution of assets rather than a loss." *Anahma Realty Corp.* v. *Commissioner,* 42 F. 2d 128, 130 (C.A. 2d), certiorari denied, 282 U.S. 854. See also *Spinks Realty Co.* v. *Burnet,* 62 F. 2d 860 (C.A. D.C.), certiorari denied, 290 U.S. 636; *Continental Illinois Nat. B. & T. Co.* v. *United States,* 18 F. Supp. 229 (C. Cls.); *Camp Wolters Land Co.* v. *Commissioner,* 160 F. 2d 84, 88 (C.A. 5th).

In the usual case the demolition is in order to clear the way for erection of a new building, but the principle is not limited to that situation. The controlling factor is the use to be made of the land by the tenant. In *Berger* v. *Commissioner,* 7 T.C. 1339, the buildings were razed in order to lease the land for a parking lot. In *Camp Wolters Land Co.* v. *Commissioner, supra,* the lessor bought houses and demolished them because they were in the line of a proposed firing range and the demolition was necessary in order to get a lessee, the Army, for the camp. In the *Eaton* case, *supra,* if the owner had destroyed an orchard in order to lease the land to a lettuce grower, it is clear that the cost would have been an expense of obtaining the lease. See also *Ingle* v. *Gage,* 52 F. 2d 738, 741 (W.D. N.Y.), where the court stated that a loss would not be allowed if, after demolition, the parcel could be used so as to be productive of greater gains or profits to the taxpayer. In *Dayton Co.* v. *Commissioner,* 90 F. 2d 767, 768 (C.A. 8th), in holding that there was a loss, the court pointed

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[3] This may be true even in a case where there is no lease, and the owner merely substitutes new buildings for old. *Commissioner* v. *Appleby's Estate,* 123 F. 2d 700, 702 (C. A. 2d).

out that the demolition was not in pursuance of any plan to replace or renew the structure "or to further use the property."

So here, the building was demolished so that the land could be put to a more productive use. It is obvious that at the present time land in cities may often be more productively and profitably used as parking lots than as the site of a building. In this very case it is undisputed that the building was not productive as a theatre building, and, significantly, the parties did not contemplate its replacement by another building. If we look solely to the demolition of the building, we see, as taxpayer would have us (Br. 40-41), that before the demolition taxpayer had a building, and after the demolition, taxpayer had no building. If we look at the context, however, we see that by the entire transaction taxpayer had substituted for one form of property another of greater value.

II

The Tax Court's Reasons for Holding that Taxpayer Sustained No Loss Are Sound

We do not believe that taxpayer will seriously contest the accuracy of the foregoing statement of the principles applicable to losses claimed on the voluntary demolition of buildings. Taxpayer rather is contesting the applicability of those principles to the factual situation here involved.

Taxpayer's principal argument (Br. 24-27), that these principles do not apply here, is based on a construction of the lease as being the agreement entered into on October 6, 1949, and upon a total disregard of the modification of April 24, 1950, a view which is wholly

unwarranted by the facts of this case. This question is discussed in Part C, below. For convenience, however, we discuss taxpayer's other contentions in the same order as in taxpayer's brief.

A. *The fact that the term of a lease is longer than the expected useful life of a building is relevant in determining whether taxpayer has sustained a loss*

If we look solely to the original lease and assume that it retained its value to taxpayer even after conversion of the building to a parking garage became impossible, as taxpayer would have us do on another point (Br. 25-26), then the court below was correct in pointing out that on the demolition of the building taxpayer sustained no loss which was uncompensated (R. 97-97). Since the building had a useful life of less than sixteen years, and the property was subject to a twenty-five year lease, there could be no loss to taxpayer on the building's demolition. See *Commissioner* v. *Moore,* 207 F. 2d 265 (C. A. 9th); *Commissioner* v. *Pearson,* 188 F. 2d 72 (C. A. 5th). If, to the contrary, the useful life of the building had extended beyond the term of the lease, then there might have been a value not compensated for by the lease, which would be lost on demolition of the building.[4] As it was, however, the remaining life of the building was compensated for by the lease payments, which were not to be diminished by removal of the building. Taxpayer was no worse off after the removal than before.

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[4] Taxpayer (Br. 18-19) cites *Lamson Bldg. Co.* v. *Commissioner,* 141 F. 2d 408 (C. A. 6th), to support the view that the cost is to be depreciated over the life of the building rather than amortized over the term of the lease. But to the contrary are *Young* v. *Commissioner, supra; Spinks Realty Co.* v. *Burnet, supra; Continental Illinois Nat. B. & T. Co.* v. *United States, supra.*

B. *If the demolition occurred as part of a sale, there is no loss apart from gain or loss on the entire transaction*

The agreement of April 24, 1950, was in effect both a lease and an option to sell. If it is regarded as the latter, then the permission to demolish the building and its immediate demolition, were part of a sale, and the basis of the building is part of the basis of the entire property, with gain or loss to be determined, as the court below pointed out (R. 97) on the basis of the entire sale price, to be reported in the year in which the sale took place.

Taxpayer's criticism of this alternative holding is (Br. 23) that the demolition of the building was a transaction independent of the option to purchase. Here again, taxpayer is asserting a rule that demolition of buildings gives rise to a tax loss in disregard of all the circumstances, and without reaching the question whether in fact a loss was sustained. Taxpayer is insisting that the only operative event was the lease agreement of October 6, 1949, that all subsequent events and agreements should be disregarded, and that if the building was not demolished in order to obtain that particular agreement, there was a loss sustained.

The weakness of that position is that the demolition did not stand alone, based on a decision by taxpayer that the building had become worthless in that taxable year. To the contrary the demolition arose in connection with negotiations between taxpayer and the lessee looking to either a continuance of the lease or a sale. The decision to demolish the building may well have been an independent event, in the sense that it was not contemplated in October, 1949, when the lease was first entered into. It was not independent of the relationship between tax-

payer and lessee as marked by the letter agreement of April 24, 1950, the formal agreement of February 23, 1951, and the final sale of September 27, 1951.

C. *The building was in fact demolished in connection with securing a lease*

Taxpayer's argument that the demolition did not occur in connection with obtaining a lease (Br. 24-37) is premised on the assumption that at the time of the demolition the lease agreement of October 6, 1949, was a valid and valuable lease, and that the demolition was not necessary in order for taxpayer to secure the benefits of that lease. In this view, the demolition was a casual event, similar to the sale or abandonment of minor portions of railroad property (Br. 29-32) involved in the railway cases cited by taxpayer (*Commissioner* v. *Providence, W. & B. R. Co.,* 74 F. 2d 714 (C. A. 2d); *Terre Haute Electric Co.* v. *Commissioner,* 96 F. 2d 383 (C. A. 7th); *Mississippi River & Bonne Terre Railway* v. *Commissioner,* 39 B. T. A. 995).

In the present case, however, the original lease was solely for the Tivoli Theatre Building. Both parties intended at the time of the lease that the building be used as a garage and solely for that purpose. (R. 134.) In fact, taxpayer's witness, who conducted the negotiations, referred to it as "a lease for the reconstruction of the building into a five-story garage." (R. 114.) The lease provided for approval by taxpayer of the plans for alteration of the building for that purpose (R. 39) and taxpayer approved the plans (R. 117-120, 124). After the City and County of San Francisco refused to approve the plans, both parties recognized that it was impossible to carry out the lease according to its intention. (R. 123.)

At that point, both legally and practically, the lease was of doubtful value to the lessor. The entire purpose of the lease, to both parties, had been frustrated. It was doubtful whether it was enforceable when it had become impossible to use the premises for the purposes contemplated. Furthermore, as a practical matter, it was unlikely that the lessor could collect more than the $10,000 guarantee by Hertz, Marofsky, the lessee, being dependent on Hertz for funds with which to carry on the enterprise (R. 129) and Hertz's limited guarantee being an essential part of the arrangement.

Under these circumstances the agreement of April 24, 1950, viewed in its aspect as a lease, was both a different and a more valuable lease. It contained a recognition by the lessee of his obligation to pay the rentals even after the purpose of the original lease had become impossible; it provided for an additional lease deposit of $25,000; it contained a new subject matter, not the lease of the building for garage purposes, which had turned out to be impossible, but the lease of the premises for ground level parking; it permitted and later required the lessee to bear the expense of demolishing the building. As set out in the formal agreement of February 23, 1951 (R. 55-80), which set forth the terms of the agreement of April 24, 1950 (R. 55), the lessee was to demolish the building immediately and might use the premises as a parking lot (R. 62). The court below was on sound ground in holding that the lease was founded upon both the October 6, 1949 and April 24, 1950, agreements. (R. 98.) Even under the original agreement the term of the lease was not to begin until May 1, 1950. (R. 31.) When the term commenced the lease had become one for a parking lot, and not for a garage. Demolition of the building was necessary

for that lease. The facts here clearly call for the application of the rule that no loss is sustained on the demolition of a building for the purposes of securing a lease.

Taxpayer further argues (Br. 36-37) that, assuming for this purpose that the agreement of April 24, 1950, is a new lease secured by granting permission to demolish the building, there is nevertheless a loss sustained if the building was in fact worthless at the time, although not if the building had value. In support of this argument taxpayer cites a dictum in *Smith Real Estate Co.* v. *Page,* 67 F. 2d 462 (C. A. 1st). We submit that the distinction there drawn is unsound and ignores the reason why demolition losses are not allowed in this situation. As the cases cited in Point I above hold, a loss is not allowed because it is not in fact sustained where it is compensated for by a valuable lease, which is regarded as a substitution of one asset for another. That substitution occurs regardless of the value of the original asset. Or, to phrase it differently, no loss has yet been sustained because the demolition for the purpose of obtaining a lease is not a closed and completed transaction. If the transfer of buildings to a lessee, to be demolished and replaced, is not a step which fixes a loss for tax purposes in the case of buildings with an actual value, as the court in the *Smith Real Estate Co.* case held, there is no reason why the same transfer should fix a loss in the case of buildings with no actual value.

In the present case also, no loss was sustained. Taxpayer started with an asset with a basis of $132,284.42, regardless of its actual market value. It ended with another asset of value, a lease calling for total payments of $420,000, and requiring the lessee to assume certain additional expenses, in razing the building, to make the

parcel more useful and productive. There was no event fixing a loss, and no uncompensated loss was sustained.

CONCLUSION

The decision of the court below is correct and should be affirmed.

Respectfully submitted,

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No. 14,822

IN THE

United States Court of Appeals

For the Ninth Circuit

BLUMENFELD ENTERPRISES, INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for Review of the Decision of The Tax Court of the United States.

REPLY BRIEF FOR PETITIONER.

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Subject Index

Table of Authorities Cited

Cases

Codes

Texts

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COMMENTS ON RESPONDENT'S STATEMENT OF FACTS.

There is little, if any, dispute as to the facts of the case (R 86-93; PB 3-9;* RB 3-10). Petitioner does object, however, to the distorted emphasis which both the respondent and the Tax Court place upon the option agreement of April 24, 1950 by referring to it as "a letter agreement looking towards the purchase of the entire Tivoli property by the lessee" (RB 6; R 89). This statement gives the impression that the demolition of the building was an integral part of the

*The briefs for Petitioner and Respondent are herein referred to as "PB" and "RB", respectively.

purchase by the lessee. However, a reading of the letter agreement clearly shows this was not the case (Exh. 4-D; R 52-54). The agreement, it is true, granted the lessee an option to purchase the property, but it gave him the absolute right, regardless of whether or not he exercised the option, to demolish the theatre building. The undisputed evidence shows, and the Tax Court found, that when the agreement was entered into, the lessee had not determined whether he would exercise the option (R 91).

ARGUMENT.

I. TAXPAYER SUSTAINED A LOSS NOT COMPENSATED FOR BY INSURANCE OR OTHERWISE ON THE DEMOLITION OF ITS BUILDING.

Respondent argues that "where the owner demolished his building in order to lease land to a tenant who is to erect new buildings, there is no uncompensated loss" (RB 12-13). He also points out that this rule has been applied in a few cases even when the lessee has not been obligated to construct a new building (RB 13-14). However, as we have already pointed out (PB 36-37), the Court of Appeals for the First Circuit in *Smith Real Estate Co. v. Page* (1933), 67 F. 2d 462 stated that this rule did not apply where the existing buildings had become valueless at the time of the lease. In such a case, the Court said, the transfer of the buildings to the lessee for the purpose of demolition would make the loss fully and immediately deductible. It is undisputed that in the instant case

the building was valueless at the time of its demolition (R 123, 137-148). Respondent makes no attempt to distinguish the *Smith* case nor does he argue that the building here involved had any value when it was demolished (RB 19).

Furthermore, permission to demolish the building was *not* given by the petitioner in the instant case in order to secure a lease; a valid lease was in existence prior to demolition and before either party had even considered the possibility of demolishing the building (R 88-89).

Respondent here cites a number of cases (RB 11-14), none of which is in point. All of these cases involve either (1) the situation described in Section 29.23(e)-2 of Regulations 111, to-wit, the case where real estate is purchased with the intention of demolishing the building thereon in order to erect a new building, or (2) a situation where a building is demolished in order to secure a lease, frequently with the lessee's obligation to erect a new building. In both situations, the unrecovered basis of the old building enters into the cost basis of the newly purchased property or of the newly acquired lease and is not immediately deductible. Such, however, is not the situation here.

At least one of the cases cited by the respondent points out this distinction. In *Eaton v. Commissioner of Internal Revenue* (C.A. 9, 1936) 81 F. 2d 332, on second appeal (1938) 95 F. 2d 268, a taxpayer purchased an orchard and shortly thereafter removed the trees therefrom and grew lettuce on the land. He

claimed a deduction for the cost of removing the trees. The Board of Tax Appeals denied the claimed deduction without finding whether or not the taxpayer intended to remove the trees at the time that he acquired the land. This Court remanded the case for such a finding. It stated that if the taxpayer had purchased the land in order to continue the business of growing apples and pears thereon, but thereafter ascertained that he could not do so with profit and for that reason destroyed the trees, he would be entitled to a deductible loss. If, on the other hand, he intended when he purchased the land to uproot the trees and enter upon the business of growing lettuce, the loss was not deductible.

The *Eaton* case therefore supports petitioner's position rather than respondent's. Here, when taxpayer acquired the property and when taxpayer and lessee entered into the lease, there was no intention to demolish the building. Therefore the permission to demolish can not be said to have been given in exchange for the leasehold.

The respondent then argues that no loss is allowable here since "the building was demolished so that the land could be put to a more productive use" (RB 14). Under this reasoning, if a taxpayer sold or otherwise disposed of an unproductive security or other asset and purchased a more profitable one, the loss on the disposition of the first would be denied. Furthermore, the respondent does not explain why the lease which had the same term and called for the same rental payments before and after permission to de-

molish the building was given was more productive after demolition than before.

The respondent then states (RB 14):

> "If we look at the context, however, we see that by the entire transaction taxpayer had substituted for one form of property another of greater value" (RB 14).

This statement is incorrect. Only by combining two independent transactions can it be said in any sense of the term that "taxpayer had substituted for one form of property another of greater value." The simple facts of the matter are that the building was *not* demolished in order to obtain a lease and that the leasehold was no substitute for the building. The lease was executed on October 6, 1949 (R 87-88). At that time neither the petitioner nor the lessee had any intention of demolishing the theatre building (R 88-89). The lessee intended to convert the property into a public garage (R 87-88). No thought was given to demolishing the building until several months after the lease was entered into (R 136). Permission was not given to the lessee to demolish the building until April 24, 1950 over six months after execution of the lease. Hence, the taxpayer did not grant permission to demolish the building in order to secure the lease, and it can not be said that taxpayer had merely substituted for one form of property (the theatre building) another of greater value (the lease).

II. THE TAX COURT'S REASONS FOR HOLDING THAT TAXPAYER SUSTAINED NO LOSS ARE NOT SOUND.

A. The Fact That the Term of the Lease Was Longer Than the Expected Useful Life of the Building Is of No Relevance in Determining Whether the Taxpayer Had Sustained a Loss.

The respondent argues that since the building had an expected useful life of less than sixteen years when the lease was entered into, and since it was subject to a twenty-five year lease, there could be no loss to the taxpayer upon the demolition of the building, citing *Commissioner v. Moore* (C.A. 9, 1953), 207 F. 2d 265 and *Commissioner v. Pearson* (C.A. 5, 1951), 188 F. 2d 72. Neither of these cases is authority for denying a loss under these circumstances. In both cases a taxpayer inherited an interest in land on which a building had been constructed by the lessee without cost to the lessor. The taxpayer claimed depreciation on the building. These cases were thus like the Tax Court case of *Albert L. Rowan* (1954), 22 T.C. 865, cited by the Tax Court in its decision in the instant case (R 97) and distinguished in petitioner's brief (PB 19-20). The Court of Appeals for the Fifth Circuit in the *Pearson* case did not even reach the merits of the case but merely held that the heir had failed to establish a basis for depreciation by failing to show how much of the estate tax valuation was attributable to the building, as distinguished from the land, and by failing to show whether the stipulated value attributable to the building entered into the value of the property for estate tax purposes.

This Court denied the claimed depreciation deduction in the *Moore* case. Just as in the *Rowan* case, the

decedent (the original lessor) in the *Moore* case had no investment in, and hence no basis for the building. Since the lessee had constructed the building, he was being allowed depreciation thereon and permitting the heir a depreciation deduction would be allowing the same deduction to two different taxpayers.

No demolition loss was involved in the *Moore, Pearson* or *Rowan* cases; no question of depreciation is involved here—the taxpayer in the instant case was admittedly entitled to depreciation while the building was in existence. Here, the taxpayer had an investment in and a cost basis (acquired by purchase) for the Tivoli theatre building. There is no possibility of a double deduction here; there is no question as to whether or not the lessee is entitled to the loss.

Petitioner pointed out (PB 18) that if the rule of law is that, where the term of a lease extends beyond the useful life of a building, the taxpayer incurs no loss upon the demolition of the building, it necessarily follows that such a lessor would also lose his right to depreciation over the useful life of the building. Such a taxpayer would then be permitted only to amortize the remaining cost of the building over the term of the lease. The petitioner added that this very argument had been made by the Commissioner and rejected by the Court of Appeals in *Lamson Bldg. Co. v. Commissioner* (C.A. 6, 1944), 141 F. 2d 408 (PB 18-19). The respondent states that the cases of *Young v. Commissioner* (C.A. 9, 1932) 59 F. 2d 691, *cert. den.* 287 U.S. 632; *Spinks Realty Co. v. Burnet* (C.A. D.C. 1932), 62 F. 2d 860, *cert den.* 290 U.S. 636,

and *Continental Illinois Nat. B. & T. Co. v. United States* (Ct. Cls. 1937), 18 F. Supp. 299 are contrary to the *Lamson* case (RB 15 footnote). This is incorrect. In the *Young, Spinks* and *Continental* cases, the buildings were demolished in order to secure a lease under which the lessee promised to construct a new building. The Courts therefore held that the remaining cost of the old building was amortizable over the term of the lease. There was no implication in any of these cases that depreciation would have been required to be taken over the term of the lease rather than over the remaining lifetime if the building had not been demolished.

Respondent then argues that "the remaining life of the building was compensated for by the lease payments, which were not to be diminished by removal of the building. Taxpayer was no worse off after the removal than before." (RB 15). There is no more reason for denying the claimed demolition loss by reason of the lease modification of April 24, 1950 than there is for denying depreciation to the taxpayer by reason of the original lease of October 6, 1949. Immediately after the original lease was entered into, taxpayer still had his building with a remaining cost basis to it of over $130,000 and also had a lease calling for payments totaling $420,000. When the building was demolished under the modification agreement of April 24, 1950, the taxpayer no longer had the building but still had a lease for the same term providing for the same rentals. Taxpayer was clearly worse off after the removal than before; prior to it he had the build-

ing with a remaining cost of over $130,000; after it, he had no building. Nor was he compensated for this loss by an advantageous lease since he had the lease prior to as well as after the demolition of the building.

B. The Fact That Permission to Demolish the Building Was Granted to the Lessee in an Option Agreement Is of No Significance.

Respondent argues next that the agreement of April 24, 1950 was in effect both a lease and an option to sell (RB 16). (Actually, of course, it was a lease modification rather than a lease.) Respondent continues that if the agreement is regarded as an option to sell, then the permission to demolish the building and its immediate demolition were part of a sale with gain or loss to be determined in the year in which the sale took place.

However, the undisputed evidence is and the Tax Court found that when the letter agreement of April 24, 1950 was entered into, the lessee had not determined whether he would exercise the option to purchase which was given therein (R 91). Furthermore, the option, originally scheduled to expire April 24, 1950 was later extended to expire on October 1, 1951 and was not exercised until September 27, 1951 (R 91-92). The respondent cites no authority for the unusual proposition that the demolition of the building in the taxpayer's fiscal year ended July 31, 1950 was somehow part of a sale of the underlying land which was not made (and which it was not known would be made) until the petitioner's fiscal year ended July 31, 1952. If the taxpayer suffered a loss on

the demolition of its building in its 1950 fiscal year, this is no authority and no reason for postponing recognition of the loss to a subsequent taxable year merely because it might well sell (and actually did sell) the underlying land in a subsequent year.

If the demolition of the building is to be considered somehow connected with the sale of the property as a whole, then the Tivoli theatre building was not sold to the lessee on September 27, 1951 when the lessee exercised his option to purchase the remaining portions of the Tivoli property since the theatre building was no longer in existence then. Rather, the theatre building was sold, if it was sold at all, in the taxpayer's fiscal year ended July 31, 1950 when the taxpayer gave the lessee permission to demolish the building and when the building was actually in fact demolished. At the end of the petitioner's fiscal year ended July 31, 1950, it was uncertain whether or not the underlying land would be sold; but it was absolutely certain that taxpayer would never receive back the Tivoli theatre building. If then, the transaction is to be considered a sale, there was a sale of the Tivoli Theatre building in the petitioner's fiscal year ended July 31, 1950 and an ordinary loss would be allowable to the petitioner under Section 117(j) of the Internal Revenue Code of 1939.

Respondent then argues that the demolition arose in connection with negotiations between the taxpayer and the lessee "looking to either a continuance of the lease or a sale" (RB 16-17). He concedes that the decision to demolish the building may well have been "an inde-

pendent event, in the sense that it was not contemplated in October, 1949, when the lease was first entered into." He argues, however, that "It was not independent of the relationship between taxpayer and lessee as marked by the letter agreement of April 24, 1950, the formal agreement of February 23, 1951 and the final sale of September 27, 1951."

It is misleading to state that the demolition arose in connection with negotiations between taxpayer and the lessee looking to either a continuance of the lease or a sale. When these negotiations which resulted in the agreement of April 24, 1950 commenced, the lease was not scheduled to expire until April 30, 1975. No extension of the term of the lease was made by the modification agreement of April 24, 1950, nor was any sale made thereby. The lessee was given an option to purchase the entire property. This option to purchase was not something received by the taxpayer in exchange for its permission to demolish the building; rather, it was a concession by the taxpayer to the lessee. Respondent's statement ignores the Tax Court's finding (R 91) that it was not known when the agreement of April 24, 1950 was entered into whether or not the option would be exercised. The demolition was thus independent of the sale of the remaining property which was finally made on September 27, 1951. What difference is there whether or not the demolition was "independent of the relationship between taxpayer and lessee as marked by the letter agreement of April 24, 1950, the formal agreement of February 23, 1951 and the final sale of Sep-

tember 27, 1951" (RB 17)? There is no doctrine in the law that requires the disallowance of a claimed demolition loss when permission to demolish is given at the same time that a lease is modified or at the same time that an option to purchase the building is entered into. The cases merely hold that where permission to demolish the building is given in order to secure an advantageous lease, the demolition loss is not allowable unless the building was of no value at the time of demolition. Here, as will be further demonstrated, permission to demolish was not given in order to secure an advantageous lease.

C. The Building Was Not Demolished in Connection With Securing a Lease.

As respondent states, taxpayer argued (PB 24-37) that at the time of the demolition the lease of October 6, 1949 was a valid and valuable lease, that the demolition was not necessary to secure for taxpayer the benefits of that lease, and that therefore the demolition, not having been anticipated at the time the lease was entered into, under the cases cited by the taxpayer (PB 29-32) constituted an allowable deduction. Respondent does not attempt to distinguish or question those cases or to deny taxpayer's premise that if the lease was valid when the modification agreement was entered into, the building was not demolished in order to secure a lease.

The distinguishing and inescapable fact is that the building in the present case was not demolished in order to secure the October 6, 1949 lease, and there-

fore the demolition loss is allowable. The respondent seeks to avoid this crucial and controlling fact by indulging in a devious and speculative argument. He argues that when the City and County of San Francisco refused to approve the lessee's plans, "both legally and practically, the lease was of doubtful value to the lessor," and that "It was doubtful whether it [the lease] was enforcible [sic] when it had become impossible to use the premises for the purposes contemplated" (R 17-18). Hence, argues respondent, the supplemental agreement of April 24, 1950 is the controlling document and the building was demolished in order to secure this new agreement.

There is not one shred of evidence in the record to indicate or even suggest that either of the parties thought that the original lease was unenforceable or that lessee's performance was excused for any reason. Both lessor and lessee at all times considered the lease as a valid and binding obligation. No issue was made in the government's notice of deficiency, nor in the pleadings of either party, nor at the trial, that the lease of October 6, 1949 was ineffective, invalid or of little value.

Respondent's speculations have no firmer foundation in the law than they have in the facts. Significantly, he cites no authority in support of his argument that the lease was legally unenforceable. On the contrary, it clearly appears that the lease was a binding and a legally enforceable obligation. The conditions imposed by the San Francisco authorities

did not forbid the conversion of the building into a garage but merely increased the anticipated cost of conversion from between $45,000 and $50,000 to in excess of $125,000 (R 88-89).

California Courts, as well as Courts in other jurisdictions, have repeatedly held that the mere fact that performance of a contract is made unprofitable, or more difficult, or more expensive than the parties anticipated when the contract was made will not excuse the duty of the promisor to perform his part of the agreement. See, for example, *Glens Falls Indemnity Company v. Perscallo* (1950), 96 Cal. App. 2d 799, 216 P. 2d 567 (contractor not excused from performing contract for construction of highway where government regulations made work more difficult and expensive); *Lloyd v. Murphy* (1944), 25 Cal. 2d 48, 153 P. 2d 47 (lease of premises for sale and repair of new automobiles not terminated by government act restricting sale of cars); *Brown v. Oshiro* (1945), 68 Cal. App. 2d 393, 156 P. 2d 976 (lease not terminable where tenant prevented from operating hotel because of evacuation of Japanese during war); *McCulloch v. Liguori* (1948), 88 Cal. App. 2d 366, 199 P. 2d 25 (contract to lease building not excused on theory of impossibility where government regulations made construction more difficult and costly); *Aristocrat Highway Displays v. Stricklen* (1945), 68 Cal. App. 2d 788, 157 P. 2d 880 (rent not recoverable on contract for outdoor illuminated advertising where cost of performance made more expensive and difficult by reason of wartime ordinance regulating illumination at

night); *Grace v. Croninger* (1936), 12 Cal. 2d 603, 55 P. 2d 941 (lease for purpose of conducting a saloon and cigar store not terminated as a result of law making liquor business illegal); *Brandow v. Holley* (1932), 121 Cal. App. 460, 8 P. 2d 1044 (lessee of garage not excused from paying rent on theory building not reasonably fit and suitable for business as result of ordinance prohibiting storage of gasoline in premises).

The California rule on impossibility or commercial frustration is succinctly stated in 12 *Cal. Jur.* 2d 226 as follows:

> "Parties should be careful about making contracts, for once made the courts will not relieve them for light or trivial reasons. Public policy is subserved by leaving the parties and their rights to be measured by the terms of their engagements. They may have made an unfortunate arrangement, but when they have entered into it voluntarily they are bound by it in the absense of equitable grounds for avoidance. They must be presumed to have contracted with reference to existing conditions known to them. A person contracting with eyes open and aware of the facts is presumed to undertake performance at the risk of interference from agencies not expressly provided against. Moreover, contracting parties cannot escape performance of their undertakings because of unforeseen hardship. Similarly, mere difficulty or unusual or unexpected expense will not excuse a party from failing to comply with the terms of his contract. Nor is it a defense that the law has rendered performance difficult or expensive."

Unlike the present case, in all of the cases cited above the event causing the alleged impossibility arose after execution of the agreement. If a promisor is not excused from performance of his promises where fortuitous supervening events produce unanticipated costs or hardships, surely with greater force the same result follows where, as here, all of the circumstances are in existence at the time of the making of the contract. In the present case, the City and County building requirements were in existence when the lease was executed and remained in effect without change. The possibility that additional cost would be incurred in remodeling the building was foreseeable and could have been anticipated and guarded against by the lessee. This was a risk which under California law the lessee is presumed to have assumed. Furthermore, there is not a scintilla of evidence that the lessee questioned the validity of the lease.

Since the lease was at all times a legally enforceable agreement and so recognized by the parties and not a worthless and unenforceable agreement as respondent would have the Court believe, the facts admit only of the conclusion that the taxpayer permitted demolition of the building solely because it was worthless and not in order to secure a lease or even a supplemental agreement.

Respondent cannot satisfactorily explain why the agreement of April 24, 1950 "was both a different and a more valuable lease" than the original lease of October 6, 1949 (RB 18). The April 24, 1950 agree-

ment (Exh. 4-D, R 52-54) modified the lease of October 6, 1949 in the following respects:

1. It gave the lessee in consideration for $25,000, an option to purchase the entire Tivoli property at an agreed price and upon specified terms.

2. In the event that the option was not exercised within one year, the $25,000 consideration for the option was to remain with the lessor as an additional lease deposit under the lease of October 6, 1949 to be deducted from the rentals at the end of the lease term.

3. The lessee was given permission to demolish the Tivoli theatre building "for the purposes conforming to said lease" and to "furnish to the lessor modified plans showing the proposed basement and ground floor development."

The agreement of April 24, 1950 specifically provides:

> "6. The Seller, as the lessor, expressly retains all of their [sic] rights under the aforementioned lease dated October 6, 1949, and makes no waiver of any of the conditions of said lease, including but not limited to the $10,000.00 guarantee by Mr. Herman Hertz."

Certainly the granting to the lessee of an option to purchase the lease did not make the lease more valuable. It was a detriment and not a benefit to the taxpayer and cannot be said to be an asset received by the taxpayer in exchange for its permission to demolish the property. No change was made with respect to the purpose of the lease; the property was still

to be used for garage and parking operations. The term of the lease was not changed, nor was the agreed rental raised. As taxpayer pointed out (PB 26-27), the $25,000 did not become the property of the taxpayer outright in exchange for permission to demolish; rather it was to be applied against the purchase price if the option was exercised and was to constitute merely an additional lease deposit if it was not exercised. Furthermore, even if it can be said that this amount was received by the taxpayer in exchange for its permission to demolish the building, the transaction would constitute a sale of the building for that amount resulting in a loss which would constitute an ordinary loss under Section 117(j) of the Internal Revenue Code of 1939 (PB 27 note).

As stated earlier, no finding was made by the Court (nor was the issue ever raised by respondent) as to the value of the lease of October 6, 1949 before and after its amendment on April 24, 1950. If this Court deems this point to be of any importance, it is respectfully submitted that the case should be remanded to the Tax Court for further evidence on the valuation question. Such a question should not be decided upon the basis of speculation and hypothesis, as the government contends, but on the basis of evidence in the record.

The petitioner argued also (PB 36-37) that even if the agreement of April 24, 1950 were considered to be a valuable new lease secured by granting permission to demolish the building, the loss on the old building

is nevertheless deductible if it was in fact worthless at the time, citing *Smith Real Estate Co. v. Page* (C.A. 1, 1933), 67 F. 2d 462. The respondent does not attempt to distinguish the *Smith* case nor does he quote any cases in opposition to the proposition of that case. He therefore admits that the *Smith* case is in point here. He expresses doubt as to the soundness of the distinction brought out in the *Smith Real Estate Co.* case. However, the soundness of the distinction, it is submitted, is clearly apparent in the following quotation from the Court's opinion in that case:

> "The correct conclusion depends, as it seems to us, on the facts in the particular case. If the existing buildings had become valueless at the time of the lease, it is probably false to the fact to say that the lessee paid, in any form or guise, compensation for them. Under such circumstances, the loss on the buildings had already occurred when the lease was made. It was not yet deductible for income tax purposes because no steps had been taken to fix it. But the transfer of the buildings to the lessee would have that effect, and would make the loss immediately deductible. On the other hand, if the buildings had value at the time of the lease, such value was surrendered to the lessee and was presumably compensated by the provisions in the lease. * * *"

Respondent's final argument is that taxpayer started with an asset (the Tivoli Theatre building) with a basis of $132,284.42 and ended with another asset of value, a lease calling for total payments of

$420,000, and requiring the lessee to assume certain additional expenses, in razing the building, to make the parcel more useful and productive (RB 19-20). The respondent, first, misstates the terms of the agreement of April 24, 1950. It did not require the lessee to assume certain additional expenses in razing the building; it merely gave the lessee permission to demolish the building. In other words, this was a concession to the lessee permitting him to demolish the building and not a concession to the lessor. Actually, taxpayer in the instant case started with an asset (the Tivoli Theatre building) with a basis of $132,284.42 and a lease calling for total payments of $420,000 and after the permission to demolish the building was given and the building was actually demolished, it had only the second of the assets, the lease calling for total payments of $420,000. Permission to demolish the building was not given in order to secure the lease; the lease had already been secured. The agreement of April 24, 1950 did not make the parcel more useful and productive to the lessor; its rents were the same under the original lease as under the amendment.

CONCLUSION.

The decision of the Tax Court is erroneous and should be reversed.

Dated, San Francisco, California,
March 5, 1956.

Respectfully submitted,

SAMUEL TAYLOR,
WALTER G. SCHWARTZ,
Counsel for Petitioner.

TAYLOR & SCHWARTZ,
Of Counsel.

No. 14825

United States
Court of Appeals
for the Ninth Circuit

GLEN T. JAMISON, Director of Internal Revenue, Appellant,

vs.

MARIA REPETTI, Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. —8-26-55

No. 14825

United States
Court of Appeals
for the Ninth Circuit

GLEN T. JAMISON, Director of Internal Revenue, Appellant,

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Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

H. BRIAN HOLLAND,
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Dept. of Justice, Washington, D. C.,
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Attorneys for Defendant and Appellant.

SEAMAN & DICK,
Attorneys at Law,
33 East Magnolia Street,
Stockton, Calif.,

Attorneys for Plaintiff and Appellee.

In the United States District Court for the Northern District of California, Southern Division

Civil No. 33161

MARIA REPETTI, Plaintiff,

vs.

GLEN T. JAMISON, Director of Internal Revenue, Defendant.

COMPLAINT FOR INJUNCTIVE RELIEF

I.

This Action is brought under Title 26 United States Code, Section 272(a)(1).

II.

The Plaintiff, Maria Repetti, is a citizen of the United States and a resident of Stockton, California. The Plaintiff and her husband, A. Repetti, filed a joint income tax return for the calendar year 1948 at the Office of the Collector of Internal Revenue for the First Collection District of Northern California at Stockton, California. A. Repetti died during the year 1950.

III.

On or about the twelfth day of December, 1952, the Defendant, Glen T. Jamison, acting through his agents, servants or employees, served or caused to be served on the Plaintiff, a notice which purported to be a Notice of Mathematical Error in compliance with Section 272(f) of Title 26 of the United States Code, when in truth and fact the alleged deficiencies asserted arise as a result of an interpretation of the

provisions of the Internal Revenue Code (see Exhibit A.).

IV.

On or about the thirtieth day of January, 1953, the Defendant Glen T. Jamison, acting through his agents, servants or employees, levied an assessment against the Plaintiff in the amount of Two Hundred Sixty and 48/100 Dollars ($260.48) and threatened, and have threatened, and do threaten to distrain the Plaintiff's property in satisfaction of said assessment, when in truth and in fact the Plaintiff did not and does not owe the United States of America the sum of Two Hundred Sixty and 48/100 Dollars ($260.48) for income taxes, penalties, or interest for the calendar year 1948, or any other sum of money as income taxes, penalties or interest for the calendar year 1948.

V.

The Plaintiff has no adequate remedy at law and will suffer great and irreparable harm and injury if the Defendant, his agents, servants or employees carry out their threats.

Wherefore, the Plaintiff prays that this Court enjoin the Defendant, his agents, servants and employees from:

1. From taking any action whatsoever to distrain the Plaintiff's property pursuant to the assessment of January 30, 1953.

2. This Court order the assessment of January 30, 1953 removed from the assessment list.

3. Such other and further relief as the Court deems just and proper in the circumstances.

Second Cause of Action

For a further separate and distinct Cause of Action, the Plaintiff alleges as follows:

I.

This Action is brought under Title 26 United States Code, Section 272(a)(1).

II.

The Plaintiff, Maria Repetti, is a citizen of the United States and a resident of Stockton, California. The Plaintiff and her husband, A. Repetti, filed a joint income tax return for the calendar year 1949 at the Office of the Collector of Internal Revenue for the First Collection District of Northern California at Stockton, California. A. Repetti died during the year 1950.

III.

On or about the twelfth day of December, 1952, the Defendant, Glen T. Jamison, acting through his agents, servants or employees, served or caused to be served on the Plaintiff, a notice which purported to be a Notice of Mathematical Error in compliance with Section 272(f) of Title 26 of the United States Code, when in truth and fact the alleged deficiencies asserted arise as a result of an interpretation of the provisions of the Internal Revenue Code (see Exhibit B).

IV.

On or about the thirtieth day of January, 1953, the Defendant Glen T. Jamison, acting through his agents, servants or employees, levied an assessment against the Plaintiff in the amount of One Hundred Thirty Two and 97/100 Dollars ($132.97) and threatened, and have threatened, and do threaten to distrain the Plaintiff's property in satisfaction of said assessment, when in truth and in fact the Plaintiff did not and does not owe the United States of America the sum of One Hundred Thirty Two and 97/100 Dollars ($132.97) for income taxes, penalties, or interest for the calendar year 1949, or any other sum of money as income taxes, penalties or interest for the calendar year 1949.

V.

The Plaintiff has no adequate remedy at law and will suffer great and irreparable harm and injury if the Defendant, his agents, servants or employees carry out their threats.

Wherefore, the Plaintiff prays that this Court enjoin the Defendant, his agents, servants and employees from:

1. From taking any action whatsoever to distrain the Plaintiff's property pursuant to the assessment of January 30, 1953.

2. This Court order the assessment of January 30, 1953 removed from the assessment list.

3. Such other and further relief as the Court deems just and proper in the circumstances.

SEAMAN & DICK,
/s/ By WAREHAM SEAMAN

Duly Verified.

EXHIBIT "A"

[Seal] Copy

U. S. Treasury Department, Office of the Director of Internal Revenue, 100 McAllister St. Bldg., San Francisco 2, Calif.

Internal Revenue Service Dec. 15, 1952
First District of California

In Replying refer to: CD: Room 823 Group 1:Gilbert:fh Serial No. 52 Dec. 290417-48 Tax Supplement No.

A. & Maria Repetti,
P.O. Box 562, Stockton, California

A mathematical verification of the items on the Federal Income Tax Return filed by you for the calendar year 1948 discloses errors which result in an increase of tax of $176.00, plus $44.00 penalty and $40.48 interest.

Your return has Not Been Audited. If, as a result of a later intensive audit it developes that additional information is necessary or further corrections must be made, you will be duly advised.

The mathematical errors are:

The statutory period has expired for allowed credit taken on this return.

Page 1 line 8 balance of tax due	$176.00
Delinquency penalty is due at the rate of 5% per 30-day period or fraction thereof not to exceed 25% in the aggregate. Penalty on $176.00 at 25% is	44.00
Interest is due at 6% per annum on $176.00 from 3-15-49 to 1-15-53 or	40.48
Amount due	$260.48

Line 8 Balance of tax: As Filed: None. As Corrected: $176.00

Immediate assessment of the increase in tax will be made in accordance with the provisions of Section 272(f) of the Internal Revenue Code. It will be appreciated if you will return a copy of this letter with your remittance in the amount indicated hereon to obviate the issuance of a formal notice and demand.

Very truly yours,

/s/ Glen T. Jamison, Director

EXHIBIT "B"

[Seal] Copy

U. S. Treasury Department, Office of the Director of Internal Revenue, 100 McAllister St. Bldg., San Francisco 2, Calif.

Internal Revenue Service Dec. 12, 1952
First District of California

In Replying refer to: CD: Room 823 Group 1:Gilbert:fh Serial No. 52 Dec. 200524-49 Tax Supplemental No.

A. & Maria Repetti
P.O. Box 562, Stockton, California

A mathematical verification of the items on the Federal Income Tax Return filed by you for the calendar year 1949 discloses errors which result in an increase of tax of $94.00, plus $25.00 penalty, and $13.97 interest.

Your return has Not Been audited. If, as a result of a later intensive audit it develops that additional information is necessary or further corrections must be made, you will be duly advised.

The mathematical errors are:

As the statutory period for allowing credit of $94.00 has expired it cannot be allowed:

Page 1 line 9 (instead of $218.00)		$312.00
Delinquency penalty is due at the rate of 5% per 30-day period or fraction thereof not to exceed 25% in the aggregate. Penalty on $312.00 (instead of $53.00) is at 25%		78.00
Interest is due at 6% per annum on $305.88 from 3-15-50 to 10-23-52	$47.81	
$6.12 from 3-15-50 to 1-15-53	1.04	
		$438.85
Amount received with return		305.88
Amount due		$132.97

Interest computed above	$ 48.85
Interest computed on return	34.88
Interest increase	$ 13.97

Immediate assessment of the increase in tax will be made in accordance with the provisions of Section 272(f) of the Internal Revenue Code. It will

be appreciated if you will return a copy of this letter with your remittance in the amount indicated hereon to obviate the issuance of a formal notice and demand.

Very truly yours,

/s/ Glen T. Jamison, Director

[Endorsed]: Filed November 5, 1953.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon reading and filing of the verified Complaint in this Action, and the Affidavit of Plaintiff in support thereof, and Good Cause appearing therefore; it is hereby ordered that the Defendant Glen T. Jamison appear and show cause on the 13th day of November, 1953 at 10 o'clock a.m. of said day in Room 258, United States Post Office Building, Seventh and Mission Streets, San Francisco, California, or as soon thereafter as Counsel may be heard why they should not be enjoined during the pendancy of this action from any distraint or other action from collecting asserted income taxes, penalties and interest due the Defendant by the Plaintiff.

It is further ordered that a copy of the Complaint and Affidavit of Plaintiff, Maria Repetti, if they have not already been served, be served with this Order on said Defendant at least five (5) days before the time fixed herein for showing cause.

Dated this 5th day of November, 1953.

/s/ LOUIS E. GOODMAN,
United States District Judge

[Endorsed]: Filed November 5, 1953.

[Title of District Court and Cause.]

MOTION TO DISMISS AND NOTICE

The defendant, Glen T. Jamison, Director of Internal Revenue, by Lloyd H. Burke, United States Attorney for the Northern District of California, his attorney, moves to dismiss this action upon the ground that this Court is without jurisdiction thereof because this action is brought to restrain the collection of Internal Revenue taxes, the maintenance of which is prohibited by Section 3653 of the Internal Revenue Code, and because the complaint fails to state a claim against defendant upon which relief can be granted.

Notice

To the Plaintiff, Maria Repetti, and to her attorneys, Seaman & Dick, J. B. O'Grady, 503 California Bldg., Stockton, Calif.:

Please Take Notice that the defendant, Glen T. Jamison, Director of Internal Revenue, will on Monday, March 8, 1954, at the hour of 10:00 o'clock a.m., in the courtroom of United States District Judge Michael J. Roche, in Room 338 in the Post Office Building, Seventh and Mission Streets, San

Francisco, California, move the above entitled court to hear the foregoing Motion to Dismiss.

Dated: This 26th day of February, 1954.

LLOYD H. BURKE,
United States Attorney
/s/ By CHARLES ELMER COLLETT,
Asst. United States Attorney
/s/ DAN S. MORRISON,
Acting Associate Civil Advisory Counsel, Internal Revenue Service.

Acknowledgment of Service attached.

[Endorsed]: Filed February 26, 1954.

[Title of District Court and Cause.]

ORDER DENYING MOTION TO DISMISS

This matter having been argued, briefed and submitted for ruling,

It Is Ordered that the motion to dismiss be, and the same hereby is, Denied without prejudice to defendant's renewing said motion before the trial court at the time the evidence has been submitted.

Dated: April 6, 1954.

/s/ GEORGE B. HARRIS,
United States District Judge

26 U.S.C.A. 271(a)(1);
Maxwell vs. Campbell, 205 F.2d 461;
F.R.C.P. 65.

[Endorsed]: Filed April 7, 1954.

[Title of District Court and Cause.]

ANSWER OF THE UNITED STATES OF AMERICA

Glen T. Jamison, Director of Internal Revenue, the defendant above-named, by Lloyd H. Burke, United States Attorney for the Northern District of California, George A. Blackstone, Assistant United States Attorney for said District, and Dan S. Morrison, Attorney, Office of the Regional Counsel, Internal Revenue Service, his attorneys, respectively allege and show:

To the First Cause of Action

1. Denies the allegations contained in paragraph I of the complaint.

2. Admits each and every allegation contained in paragraph II of the complaint.

3. Denies each and every allegation contained in paragraph III of the complaint except he admits that on or about the 12th day of December, 1952, he served on the plaintiff and her husband, A. Repetti, Notice of Mathematical Error under Section 272(f) of the Internal Revenue Code with respect to the income tax return of the plaintiff and her husband for 1948.

4. Denies each and every allegation contained in paragraph IV of the complaint, except he admits that an assessment was made against the plaintiff in the amount of $260.48; alleges that said assessment was made on December 12, 1953.

5. Denies each and every allegation contained in paragraph V of the complaint.

To the Second Cause of Action

1. Denies the allegations contained in paragraph I of the complaint.

2. Admits each and every allegation contained in paragraph II of the complaint.

3. Denies each and every allegation contained in paragraph III of the complaint except he admits that on or about the 12th day of December, 1952, he served on plaintiff a Notice of Mathematical Error under Section 272(f) of the Internal Revenue Code with respect to the income tax return of the plaintiff and her husband for the year 1949.

4. Denies each and every allegation contained in paragraph IV of the complaint except he admits that an assessment was made against the plaintiff; alleges that said assessment was made on December 12, 1953, and was in the amount of $312.00 plus $78.00 penalty and $48.85 interest, and that payments of $305.88 have been made, leaving a balance due of $132.97.

5. Denies each and every allegation contained in paragraph V of the complaint.

For a Complete Defense to the First and Second Causes of Action Alleged in the Complaint

1. That this Court is without jurisdiction of this action because it is a suit to restrain the collection of internal revenue taxes the maintenance of which

is prohibited by Section 3653(a) of the Internal Revenue Code.

LLOYD H. BURKE,
United States Attorney
/s/ By GEORGE A. BLACKSTONE,
Asst. United States Attorney
/s/ DAN S. MORRISON,
Attorney, Office of the Regional Counsel, Internal Revenue Service.

Acknowledgment of Service attached.

[Endorsed]: Filed July 29, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR SUMMARY JUDGMENT

Please take notice that upon annexed Affidavit of Wareham C. Seaman, duly sworn to November 17th, 1954, and upon the pleadings herein, the exhibits annexed thereto and all the proceedings heretofore had herein, the undersigned will move this Court, at Room 244 of the United States Courthouse, Post Office Building, 7th and Mission Streets, San Francisco, California, on the 29 day of November, 1954, at 9:30 o'clock in the forenoon or as soon thereafter as counsel can be heard for an Order under Rule 56 of the Federal Rules of Civil Procedure for Summary Judgment in favor of the Plaintiff upon all of the grounds as set forth in the moving papers herein and for such other and dif-

ferent relief as to the Court may seem just and proper in the premises.

Dated: November 17, 1954.

/s/ WAREHAM C. SEAMAN,
Attorney for Plaintiff

MOTION FOR SUMMARY JUDGMENT

The plaintiff, Maria Repetti, by Wareham C. Seaman, her attorney, hereby moves the Court to enter Summary Judgment for the plaintiff, in accordance with the provisions of Rule 56 of the Rules of Civil Procedure, on the ground that the Pleadings and Affidavit hereto attached, and marked Exhibit "A", show that plaintiff is entitled to judgment as a matter of law.

/s/ WAREHAM C. SEAMAN,
Attorney for Plaintiff

EXHIBIT "A"

Affidavit in Support of Motion for Summary Judgment

State of California,
County of San Joaquin—ss.

Wareham C. Seaman, being first duly sworn, deposes and says:

I am the attorney for the Plaintiff, and have personal knowledge of all the facts herein set forth.

This affidavit is submitted in support of the Plaintiff's Motion for Summary Judgment herein,

for the purpose of showing that there is in this action no genuine issue as to any material fact, and that the Plaintiff is entitled to judgment as a matter of law.

The facts within affiant's personal knowledge in support of the Motion for Summary Judgment are as follows:

Maria Repetti and A. Repetti were husband and wife residing in the City of Stockton, State of California. Within the period provided by law, Maria and A. Repetti filed a Joint Declaration of Estimated Tax for the calendar year 1945 and paid to Defendant thereon the sum of Two Hundred Ninety-Six ($296.00) Dollars. No personal income tax returns were filed by Maria Repetti or A. Repetti during the calendar years 1944 to 1951, both inclusive, until October 23, 1952;

That A. Repetti died during the calendar year 1950;

That the Plaintiff took credit for the tax paid on the 1945 Declaration of Estimated Tax on the final returns filed by the Plaintiff as follows: 1. Calendar year 1946, $26.00; 2. Calendar year 1948, $176.00; and 3. Calendar year 1949, $94.00.

That on December 15, 1952, Defendant mailed to Plaintiff a notice of mathematical error disallowing said credit in the sum of One Hundred Seventy-Six ($176.00) Dollars for the calendar year, 1948, and a credit in the sum of Ninety-Four ($94.00) Dollars for the calendar year, 1949.

That no notice of deficiency was mailed to the Plaintiff by registered mail as provided by Section 272(a)(1).

There are no mathematical errors on the returns filed by Plaintiff for the calendar years 1948 and 1949 entitling the Defendant to collect the tax alleged to be due under the provisions of Section 272(f) of the Internal Revenue Code.

Defendant has filed liens against the Plaintiff.

There exists no genuine issue as to any material fact and Plaintiff is entitled to Summary Judgment as a matter of law.

/s/ WAREHAM C. SEAMAN

Subscribed and sworn to before me this 17th day of November, 1954.

[Seal] /s/ GENE E. MANSHILDOR,
Notary Public in and for the County of San Joaquin, State of California.

[Endorsed]: Filed November 19, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR SUMMARY JUDGMENT

Please take notice that upon the attached affidavit of Wayne L. Prim, duly sworn to November 24, 1954, and upon the pleadings herein and all the proceedings heretofore had herein, the undersigned

will move this Court, at Room 244 of the United States Courthouse, Post Office Building, 7th and Mission Streets, San Francisco, California, on the 29th day of November, 1954, at 9:30 o'clock in the forenoon or as soon thereafter as counsel can be heard for an Order under Rule 56 of the Federal Rules of Civil Procedure for Summary Judgment in favor of the defendant upon all the grounds as set forth in the various pleadings and documents herein and for such other and different relief as to the Court may seem just and proper in the premises.

Dated: November 24, 1954.

LLOYD H. BURKE,
United States Attorney

/s/ By CHARLES ELMER COLLETT,
Asst. United States Attorney

/s/ WAYNE L. PRIM,
Attorney, Office of Regional Counsel, Internal Revenue Service.

MOTION FOR SUMMARY JUDGMENT

The defendant, Glen T. Jamison, Director of Internal Revenue, by Lloyd H. Burke, United States Attorney for the Northern District of California, his attorney, hereby moves the Court to enter a Summary Judgment for the defendant in accordance with the provisions of Rule 56 of the Federal Rules of Civil Procedure, on the ground that the pleadings and affidavit hereto attached, and marked

Exhibit "A", show that defendant is entitled to judgment as a matter of law.

/s/ LLOYD H. BURKE,
United States Attorney
/s/ By CHARLES ELMER COLLETT,
Asst. United States Attorney
[Seal] /s/ WAYNE L. PRIM,
Attorney, Office of the Regional Counsel, Internal Revenue Service.

EXHIBIT "A"

Affidavit in Support of Motion for Summary Judgment

State of California,
City and County of San Francisco—ss.

Wayne L. Prim, being first duly sworn, deposes and says:

I am an attorney, Regional Counsel's Office, Internal Revenue Service, and have personal knowledge of all the facts herein set forth.

The files and records of the Internal Revenue Service relating to the above-entitled matter disclose the following:

Taxpayers A. Repetti and Maria Repetti on October 23, 1952, filed joint income tax returns for the calendar years 1948 and 1949. The return for the year 1948 indicated that there was a total tax due of $176.00. Attached to the face of the return and made a part of the return was a note reading as follows: "Tax $176, less: Overpayment due to pay-

ment on 1945 estimated tax declaration, Block No. 1576, $176.00—due none."

On the return for the year 1949, taxpayers indicated an income tax due of $312.00. Attached to the face thereof and made a part of the return was a note reading as follows: "Tax $312.00 less: Overpayment due to 1945 declaration estimated tax payment (block No. 1676) $94.00, balance of tax $218.00, 25% penalty $53.00, interest at 6% to November 15, 1952, $34.88, total $305.88."

Plaintiff and her husband never filed any claim for refund or credit of their 1945 estimated tax payments other than that which was made by filing on October 23, 1952, the delinquent joint income tax returns for the calendar years 1948 and 1949 as stated above.

/s/ WAYNE L. PRIM

Subscribed and sworn to before me this 24 day of November, 1954.

[Seal] /s/ MARGARET P. BLAIR,
Deputy Clerk, U. S. District Court, Northern District of California.

Acknowledgment of Service attached.

[Endorsed]: Filed November 24, 1954.

In the United States District Court for the Northern District of California, Southern Division

No. 33161

MARIA REPETTI, Plaintiff,

vs.

GLEN T. JAMISON, Director of Internal Revenue, Defendant.

MEMORANDUM AND ORDER

Plaintiff instituted this action under 26 U.S.C. §272(a)(1) to restrain the assessment of income taxes claimed by defendant to be due to the Government. The section under which plaintiff proceeds provides as follows:

"If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed * * * the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the

provisions of section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court."

Defendant resists plaintiff's demand for an injunction, claiming that the alleged deficiency in plaintiff's return was the result of mathematical error, and therefore falls within 26 U.S.C. §272(f) which contains an exception to Section 272 (a)(1). It provides in part:

"If the taxpayer is notified that, on account of a mathematical error appearing upon the face of the return, an amount of tax in excess of that shown upon the return is due, and that an assessment of the tax has been or will be made on the basis of what would have been the correct amount of tax but for the mathematical error, such notice shall not be considered * * * as a notice of a deficiency, and the taxpayer shall have no right to file a petition with the Board based on such notice, nor shall such assessment or collection be prohibited by the provisions of subsection (a) of this section."

The facts which gave rise to this dispute are set forth in the pleadings, and both parties have moved for summary judgment. Plaintiff (and plaintiff's now deceased husband) filed a declaration of estimated tax for the year 1945, and paid $296 as the tax estimated for that year; but part of the $296 was in fact an overpayment. In 1952 plaintiff filed returns for the years from 1944 through 1949 in-

clusive. The returns for 1948 and 1949 indicated some tax liability for those years but plaintiff claimed as a credit against that liability the amount paid as an overpayment on the 1945 declaration of estimated tax. In December of 1952 the Director of Internal Revenue issued a Notice of Mathematical Error pursuant to 26 U.S.C. §272(f). The notice stated that the error consisted of claiming a credit with respect to which the statutory period for allowance had expired.

A search of the authorities has not revealed a judicial construction of the term "mathematical error"; but it is the opinion of this Court that the term as used in the statute in question was meant to refer to errors in arithmetic. This opinion is based primarily on the common meaning given to the phrase "mathematical error," and also on the fact that Congress did not provide for a petition by the taxpayer to the Board of Tax Appeals in the case of such error. It would appear that the failure to provide for review of a determination of mathematical error was due to the fact that there can be no dispute as to a matter of arithmetical computation.

The alleged error of the plaintiff was not a mistake in arithmetic or an inadvertent entry, and therefore it was not a mathematical error within the meaning of 26 U.S.C. §272(f). Thus the Notice of Mathematical Error issued to plaintiff was ineffective as such, and plaintiff is entitled to the relief prayed for. It is not necessary for this Court to decide whether or not the credit claimed by

plaintiff was barred by statute, because the purpose of the injunction referred to in Section 272(a) is to provide for an administrative review of a determination of deficiency. This was emphatically stated in Ventura Oil Fields vs. Rogan, 9th Cir., 86 F.2d 149, 154-155:

"The injunction of section 274(a) (now section 272(a)) is provided for the specific purpose of assuring taxpayer that a claimed deficiency shall be determined by the administrative process and adjudication by the Board of Tax Appeals provided by the statute. It must be granted without condition. The Commissioner, by failing to perform his administrative duty, cannot deprive taxpayer of his statutory right and convert the special injunctive proceeding into a judicial determination of the tax."

Accordingly, It Is Ordered that the motion of plaintiff Maria Repetti for summary judgment be, and the same is hereby granted. The assessment of January 30, 1953 is hereby ordered to be removed from the assessment list, and defendant Glen T. Jamison, Director of Internal Revenue, his agents, servants and employees are hereby enjoined from taking any action to distrain plaintiff's property pursuant to the assessment of January 30, 1953.

Dated: February 2, 1955.

/s/ OLIVER J. CARTER,
United States District Judge

[Endorsed]: Filed February 4, 1955.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR REHEARING

To: Wareham C. Seaman, Attorney for Plaintiff, 33 East Magnolia St., Stockton, Calif.:

Please take notice that the undersigned will move this Court, at Room 244 of the United States Courthouse, Post Office Building, 7th and Mission Streets, San Francisco, California, on the 21st day of February, 1955, at 9:30 o'clock in the forenoon or as soon thereafter as counsel can be heard, to rehear the matter of Summary Judgment herein and to vacate the order entered February 2, 1955, and for such other and different relief as stated in the attached motion.

Dated: February 11, 1955.

LLOYD H. BURKE,
United States Attorney
/s/ By CHARLES ELMER COLLETT,
Asst. United States Attorney
/s/ WAYNE L. PRIM,
Attorney, Office of Regional Counsel, Internal Revenue Service.

MOTION FOR RECONSIDERATION OR REHEARING

Comes now the defendant, Glen T. Jamison, Director of Internal Revenue, by Lloyd H. Burke, United States Attorney for the Northern District of California, his attorney, and

Moves that a rehearing be granted in the above entitled case for the following reasons and upon the following grounds:

On February 2, 1955, this Court entered an order granting the plaintiff an injunction restraining the assessment and collection of taxes alleged to be due the United States. The Court in its memorandum of the law based the injunction on the conclusion that the error involved was not a mistake in arithmetic or an inadvertent entry and hence was not a mathematical error within the meaning of section 272(f), 1939 Internal Revenue Code. It therefore concluded that the notice as such was ineffective. No discussion was made as to the existence or nonexistence of a "deficiency" as required for the application of section 272(a), 1939 Internal Revenue Code, authorizing an injunction.

It is respectfully submitted that assuming, arguendo, the Court's finding that the notice of mathematical error was defective is correct, this in itself does not give rise to a basis for an injunction. The restraining of assessments or collection of any tax is specifically prohibited in no uncertain terms by section 3653(a) of the 1939 Internal Revenue Code. That section creates an exception to this broad prohibition only when section 272(a), supra, applies. Nowhere in the exception is there authority for granting an injunction upon a mere finding that a notice under section 272(f), supra, was defective.

Section 272(a), Internal Revenue Code, supra, the provision authorizing an injunction, is clearly dependent for its operation upon the existence of a

"deficiency". As was discussed in defendant's original brief, section 271(b)(1), 1939 Internal Revenue Code, specifically excludes from the determination of a deficiency any credits based on payments on account of estimated tax. Here the parties are in complete agreement that the only item in controversy and with reference to which the notice was sent was a credit based on a payment on account of estimated tax. Therefore, the conclusion is inescapable that no "deficiency" exists under section 272 (a), 1939 Internal Revenue Code, supra, and accordingly no injunction is authorized.

The issuance of a "90 day letter" is required only in those situations involving "deficiencies" in income, estate and gift tax. Absent a deficiency in a given case the Commissioner is authorized under the general assessment authority provided in section 3640, 1939 Internal Revenue Code, to make an assessment immediately without issuing any 90 day letter.

Any doubts that may have existed as to the proper method to be followed in collection of tax arising by reason of a dispute over the allowance of a credit based on a payment made in reference to estimated tax have been completely eliminated by the language of the 1954 Internal Revenue Code. Section 6201 (1954 Internal Revenue Code) provides as follows:

Chapter Assessment

* * * * *

Subchapter A—In General

* * * * *

Sec. 6201. Assessment Authority.

(a) Authority of Secretary or Delegate.—The Secretary or his delegate is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law. Such authority shall extend to and include the following:

* * * * *

(3) Erroneous Income Tax Prepayment Credits.—If on any return or claim for refund of income taxes under subtitle A there is an overstatement of the credit for income tax withheld at the source, or of the amount paid as estimated income tax, the amount so overstated which is allowed against the tax shown on the return or which is allowed as a credit or refund may be assessed by the Secretary or his delegate in the same manner as in the case of a mathematical error appearing upon the return.

Although the taxes in this proceeding accrued under a former Internal Revenue Law (1939 Code), they are clearly covered as the above section expressly provides. Subsection 6201(a)(3), 1954 Internal Revenue Code, supra, directs that assess-

ments made in connection with payments on estimated tax be assessed in the same manner as in the case of a mathematical error appearing upon the return.

In the event the Court should deny defendant's motion, it is requested of the Court that a further clarification of the order be made. As defendant interprets the order it applies only to the assessment of January 30, 1953, and therefore does not restrain the Director from making a new assessment pursuant to section 6201 of the 1954 Internal Revenue Code. However, before proceeding under this section, which may be timely done in this case, we wish to advise this Court of the action which the defendant proposes to take under the new Internal Revenue Code and which action will render this cause moot.

Wherefore, it is prayed that this motion be granted.

Dated: This 11th day of February, 1955.

LLOYD H. BURKE,
United States Attorney

/s/ By CHARLES ELMER COLLETT,
Asst. United States Attorney

/s/ WAYNE L. PRIM,
Attorney, Office of Regional Counsel, Internal Revenue Service.

Acknowledgment of Service attached.

[Endorsed]: Filed February 12, 1955.

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

Defendant moves for reconsideration of this Court's order of February 2, 1955. That order granted plaintiff an injunction restraining the assessment and collection of income taxes alleged to be due the United States.

The amount alleged to be due the United States is small, and no doubt the defendant would like to avoid the procedure of issuing a ninety day letter (which is likely to be followed by the taxpayer filing a petition with the Tax Court). Defendant's first attempt to avoid issuing a notice of deficiency was to send plaintiff a Notice of Mathematical Error. In case of mathematical error the taxpayer has no right to petition the Tax Court, and the Director of Internal Revenue is under no obligation to wait ninety days before making an assessment. But the error which defendant alleges plaintiff made is not a mathematical error at all, as discussed in this Court's order of February 2, 1955.

Defendant now seeks to avoid issuing a ninety day letter by arguing that no deficiency exists. This argument is based on the fact that the only controversy between plaintiff and defendant is whether it was proper for plaintiff to take a credit for an overpayment of tax made in a previous year. Defendant contends that no deficiency resulted from plaintiff taking this credit, if it was erroneously taken, because 26 U.S.C.A. §271(b)(1) directs that payments on account of estimated tax should not

be considered in the computation of the proper tax. That section provides in part:

"The tax imposed by this chapter and the tax shown on the return shall both be determined without regard to payments on account of estimated tax * * *"

In the opinion of this Court the quoted words have reference to payments made on account of tax for the tax year in question, and they do not refer to credits taken for overpayments made on account of estimated tax in prior years. The credit taken by plaintiff here was not for a payment on account of estimated tax for the year in question, but was a credit for an overpayment made several years before. Therefore the dispute between the parties is whether the plaintiff correctly took a credit in computing the amount due the Government in the year in question; the parties are not in dispute as to whether payments were made on account of tax admittedly owing to the Government.

Even under the construction of Section 271(b)(1) urged upon this Court by defendant, there would be a deficiency because plaintiff did in fact take the credit in computing her tax. If such action was erroneous under Section 271(b)(1), then a deficiency exists.

Defendant contends that there is no deficiency because plaintiff admits that she incurred a certain amount of tax liability in the year in question; this contention is refuted in Appeals of Moir, et al., 3 B.T.A. 21, 22:

"* * * in cases in which the taxpayer shows an amount of tax upon his return but does not admit that that amount of tax is due and collectible, it is the amount which he admits to be due and not the amount which appears upon the face of the return which is deemed the starting point in the computation of a deficiency." (Citation omitted.)

It is immaterial that the defendant has refused to use the term "deficiency" in his notice to plaintiff. In Moore vs. Cleveland Ry. Co., 6th Cir., 108 F.2d 656, 659, the Court said:

"It would seem, therefore, that whenever the taxpayer has failed to make adequate return of income, there is a deficiency, notwithstanding lack of determination by the Commissioner or his agents."

In Maxwell vs. Campbell, 5th Cir., 205 F.2d 461, the Government took a position similar to the position of defendant here; that is, the Government contended that certain assessments that had been made were not deficiency assessments. The court there held that the assessments were deficiency assessments, and that the taxpayer was entitled to an injunction because no ninety day letter had been sent. See also Hastings & Co. vs. Smith, E.D. Pa., 122 F.Supp. 604, 608-609, to the same effect.

In short, defendant by evasive and ambiguous action is seeking to avoid giving the taxpayer the opportunity to test the correctness of her claimed credit in the Tax Court. The patently spurious claim of mathematical error is indicative of an intention to frustrate rather than promote the pur-

pose of the internal revenue laws to give the taxpayer his day in court. The present claim of no deficiency is equally spurious. The precise purpose of the injunctive power given the courts under 26 U.S.C.A. 272(a) is to prevent arbitrary action on the part of the tax collecting authorities of the type and character here shown.

This Court does not express any opinion as to the validity of plaintiff's action in taking the disputed credit; as stated in this Court's order of February 2, 1955, the purpose of the injunction provided for by Section 272(a) is to permit the determination of such questions to be made by the Tax Court.

Defendant has stated an intention to proceed under the Internal Revenue Act of 1954. Such action has not yet been taken, and therefore the propriety of such action, if it were taken, is not before this Court. Accordingly no opinion is expressed as to the validity of action contemplated by defendant under the 1954 Act.

It Is Ordered that the motion of defendant for reconsideration of this Court's order of February 2, 1955, be, and the same is hereby denied.

Dated: April 18, 1955.

/s/ OLIVER J. CARTER,
United States District Judge

[Endorsed]: Filed April 18, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States, defendant above named, hereby appeals to the Court of Appeals for the Ninth Circuit from the memorandum and order entered on February 2, 1955 and filed of record on February 4, 1955 wherein this Court ordered that the motion of the plaintiff (above named) for summary judgment be granted; that a certain assessment be removed from the assessment list and that defendant, its agents, servants and employees be enjoined from collecting from plaintiff by distraint; and, from the memorandum and order entered and filed of record on April 18, 1955 wherein the motion of the defendant for reconsideration or rehearing of the memorandum and order of February 2, 1955, which motion was timely filed pursuant to Rule 59 of the Federal Rules of Civil Procedure, was denied.

LLOYD H. BURKE,
United States Attorney

/s/ By CHARLES ELMER COLLETT,
Asst. United States Attorney

/s/ ALONZO W. WATSON, JR.,
Attorney, Office of Regional Counsel, Internal Revenue Service.

[Endorsed]: Filed June 16, 1955.

In the United States District Court for the Northern District of California, Southern Division

No. 33161

MARIA REPETTI, Plaintiff,

vs.

GLEN T. JAMISON, Director of Internal Revenue, Defendant.

JUDGMENT

The motion of the plaintiff, Maria Repetti, for summary judgment and the motion of the defendant, Glen T. Jamison, for summary judgment having come on for hearing on November 29, 1954, and the Court at that time having granted the oral motions of the parties for permission to submit their respective motion for summary judgment on briefs, and the parties having duly filed briefs in support of their motions for summary judgment; the Court having fully considered such briefs and having entered, on February 2, 1955, a memorandum and order granting the plaintiff's motion for summary judgment.

It Is Hereby Ordered, Adjudged and Decreed:

1. That the motion of the plaintiff, Maria Repetti be, and hereby is granted.

2. That the assessment of the defendant, Glen T. Jamison, against the plaintiff, Maria Repetti, dated January 30, 1953 be removed from the assessment list.

3. That the defendant, Glen T. Jamison, his

agents, servants and employees be, and hereby are, enjoined from taking any action to distrain plaintiff's property pursuant to the assessment of January 30, 1953.

It further appearing that, thereafter and within the period of ten days prescribed by Rule 59 of the Federal Rules of Civil Procedure, the defendant, Glen T. Jamison, filed a motion for rehearing or reconsideration of the Court's order of February 2, 1954, and the parties having filed a stipulation to submit such motion on briefs, supporting briefs having been duly submitted, the Court having fully considered such brief and having entered a memorandum and order denying the defendant's motion for reconsideration or rehearing.

It Is Hereby Ordered, Adjudged and Decreed:

That the motion of defendant for reconsideration of this Court's order of February 2, 1955 be, and hereby is denied.

/s/ OLIVER J. CARTER,
United States District Judge

Approved as to form, as provided in Rule 21, General Rules of Practice, District Court of the United States, Northern District of California.

SEAMAN & DICK,
/s/ By WAREHAM C. SEAMAN,
Attorneys for Plaintiff,
Maria Repetti

[Endorsed]: Filed June 21, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Glen T. Jamison, the defendant above-named, hereby appeals to the Court of Appeals for the Ninth Circuit from the Judgment entered in the above-entitled action on June 21, 1955.

LLOYD H. BURKE,
United States Attorney
/s/ By CHARLES ELMER COLLETT,
Asst. United States Attorney
/s/ ALONZO W. WATSON, JR.,
Attorney, Office of Regional Counsel, Internal Revenue Service.

[Endorsed]: Filed June 24, 1955.

[Title of District Court and Cause.]

DOCKET ENTRIES

1953

Nov. 5—1. Filed complaint—issued summons.

Nov. 5—2. Filed order show cause returnable Nov. 13, 1953 at 10 a.m. (Goodman).

Nov. 13—Ord. cont'd to Nov. 24, 1953, on consent of counsel. (Goodman)

Nov. 20—3. Filed summons, executed as to DA & AG, Nov. 12, 1953; as to Jamison Nov. 6, 1953.

Nov. 20—4. Filed cert. copy order show cause, executed same as summons.

1953

Nov. 24—Hearing on order to show cause. Arguments heard and application for injunction denied without prejudice. (Goodman)

1954

Jan. 8—5. Filed stip. ext. time for deft. to plead to Feb. 11, 1954.

Feb. 26—6. Filed notice & motion by deft. to dismiss, March 8, 1954.

Feb. 26—7. Filed memo. of deft. in support of motion to dismiss.

Mar. 8—Ord. motion to dism. cont'd. to April 5, 1954. (Roche)

Apr. 5—8. Filed brief of plaintiff in opposition to motion to dismiss.

Apr. 5—Ord. after hearing motion to dism. subm. (Harris)

Apr. 7—9. Filed order denying motion of defendant to dismiss, without prejudice. (Harris)

Apr. 8—Mailed copies order to counsel.

July 29—10. Filed answer of the U. S.

Nov. 19—11. Filed notice by plaintiff of motion for summary judgment, Nov. 29, 1954, with affidavit.

Nov. 24—12. Filed notice and motion by defendant for summary judgment, Nov. 29, 1954.

Nov. 29—Ord. after hearing memos. to be filed 15-15-10 days and motion for summary judgment con'td. to Jan. 14, 1955 for subm. (Carter)

1954

Dec. 13—13. Filed memo. of plaintiff in support of motion for summary judgment.

Dec. 29—14. Filed memo. of deft. in support of motion for summary judgment.

1955

Jan. 6—15. Filed reply brief of plaintiff in support of motion for summary judgment.

Jan. 14—Ord. case subm. (Goodman for Carter)

Feb. 4—16. Filed memo. order of court motion of plaintiff Maria Repetti for summary judgment granted and assessment of Jan. 30, 1953 ordered removed from assessment lists. Defts. enjoined from taking action to distrain plaintiff's property pursuant to said assessment. (Carter)

Feb. 12—17. Filed notice by deft. of motion for rehearing motion for summary judgment, Feb. 21, 1955 before Judge Carter.

Feb. 17—18. Filed stip. that motion for rehearing be submitted on briefs seriatim or concurrently as directed by Court.

Feb. 21—Ord. case cont'd. to March 11, 1955 for subm. (Carter)

Mar. 2—19. Filed memo. of plaintiff in opposition to motion for rehearing.

Mar. 10—20. Filed memo. of deft. in support of motion for reconsideration and rehearing.

Mar. 11—Ord. case subm. (Carter)

Apr. 18—21. Filed memo. and ord. of court. (Motion for reconsideration of order of Court, Feb. 2, 1955, denied.) (Carter)

1955

Apr. 19—Mailed copies order to counsel.

Jun. 16—22. Filed notice of appeal by deft.

Jun. 21—23. Filed judgment—entered June 21, 1955—motion of plaintiff for summary judgment granted and assessment vs. plaintiff dated Jan. 30, 1954, removed from assessment list. Motion of defendant for reconsideration denied. (Carter)

Jun. 21—Mailed notices.

Jun. 24—24. Filed notice of appeal by defendant.

Jun. 24—25. Filed appellant's designation of record on appeal.

Jun. 27—Mailed notices.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals filed in this Court, or true and correct copies of the docket entries, in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for the appellant:

Complaint for injunctive relief.

Order to show cause.

Motion to dismiss and notice.

Order denying motion to dismiss.

Answer of the United States.

Notice of motion for summary judgment with

motion and affidavit in support attached (Defendant's).

Notice of motion for summary judgment with motion and affidavit in support attached (Plaintiffs).

Memorandum and Order filed Feb. 4, 1955.

Notice of motion for rehearing with motion attached.

Memorandum and Order filed April 18, 1955.

Notice of appeal filed June 16, 1955.

Judgment.

Notice of appeal filed June 24, 1955.

Designation of record on appeal.

Docket entries.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 19th day of July, 1955.

[Seal] C. W. CALBREATH, Clerk
/s/ By WM. C. ROBB, Deputy Clerk

[Endorsed]: No. 14825. United States Court of Appeals for the Ninth Circuit. Glen T. Jamison, Director of Internal Revenue, Appellant, vs. Maria Repetti, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: July 19, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14825

GLEN T. JAMISON, District Director of Internal Revenue, Appellant,

vs.

MARIA REPETTI, Appellee.

STATEMENT OF POINTS ON APPEAL

Pursuant to Rule 17 of the Rules of the United States Court of Appeals for the Ninth Circuit the Appellant, Glen T. Jamison, hereby files the following statement of points on which he intends to rely:

1. The District Court erred in granting the Plaintiff-Appellee's Motion for Summary Judgment.

2. The District Court erred in denying the Defendant-Appellant's Motion for Summary Judgment.

3. The District Court erred in denying the Defendant-Appellant's Motion for Reconsideration or Rehearing.

4. The District Court erred in ordering the assessment, dated January 30, 1953, made by the Defendant-Appellant against the Plaintiff-Appellee, be removed from the assessment list.

5. The District Court erred in ordering that the

Defendant-Appellant, his agents, servants and employees be enjoined from taking any action to distrain Plaintiff-Appellee's property pursuant to the assessment of January 30, 1953.

Dated: July 29, 1955.

LLOYD H. BURKE,
United States Attorney

/s/ By CHARLES ELMER COLLETT,
Asst. United States Attorney

/s/ ALONZO W. WATSON, JR.,
Attorney, Office of Regional Counsel, Internal Revenue Service.

[Endorsed]: Filed Aug. 3, 1955. Paul P. O'Brien, Clerk.

No. 14,825

IN THE

United States Court of Appeals

For the Ninth Circuit

GLEN T. JAMISON, Director of Internal Revenue,

Appellant,

vs.

MARIA REPETTI,

Appellee.

On Appeal from the Judgment of the United States District Court for the Northern District of California.

BRIEF FOR THE APPELLANT.

H. BRIAN HOLLAND,
Assistant Attorney General.
ELLIS N. SLACK,
ROBERT N. ANDERSON,
KENNETH E. LEVIN,
Attorneys, Department of Justice.
Washington 25, D. C.
LLOYD H. BURKE,
United States Attorney.
CHARLES E. COLLETT,
Assistant United States Attorney.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

INDEX

Citations

Cases

Statutes

No. 14,825

IN THE

United States Court of Appeals

For the Ninth Circuit

GLEN T. JAMISON, Director of Internal Revenue,

Appellant,

vs.

MARIA REPETTI,

Appellee.

On Appeal from the Judgment of the United States District Court for the Northern District of California.

BRIEF FOR THE APPELLANT.

OPINIONS BELOW.

The opinions of the District Court are reported at 131 F. Supp. 626.

JURISDICTION.

This appeal involves federal income taxes. The Commissioner has assessed taxes against taxpayer for the years 1948 and 1949. Taxpayer seeks an injunction to prevent distraint of her property pursuant to the assessment and an order removing the assessment from the assessment list. (R. 4, 6.) Taxpayer

brought her action in the District Court pursuant to the provisions of Section 272(a)(1) of the Internal Revenue Code of 1939. (R. 3, 5.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1340. The judgment was entered on June 21, 1955. (R. 36-37.) On June 16, 1955, a notice of appeal was filed. (R. 35.) Since this was prior to the filing of the judgment, another notice of appeal was filed subsequently on June 24, 1955. (R. 38.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED.

Whether an injunction should issue under Section 272(a)(1) of the Internal Revenue Code of 1939 to prevent the collection of an income tax and whether assessment of such tax against the taxpayer should be removed from the assessment list on the ground that no deficiency notice preceded assessment of the tax, where the amount assessed did not exceed the amount shown as the tax by the taxpayer on her return.

STATUTES INVOLVED.

The pertinent provisions of the statutes involved are set forth in the Appendix, *infra*.

STATEMENT.

A. Repetti, now deceased, and Maria Repetti were husband and wife. For the year 1945, they filed a joint declaration of estimated tax and paid thereon $296. No personal income tax returns were filed for the year 1945 or any year from 1944 to 1949, inclusive, until 1952, when joint income tax returns in the names of A. Repetti and Maria Repetti were filed for those years. (R. 23-24.) The return for the year 1948 indicated that there was a tax due of $176. Attached to the face of the return and made a part of the return was a note reading as follows: "Tax $176, less: Overpayment due to payment on 1945 estimated tax declaration, Block No. 1576, $176.00—due none." (R. 17, 20-21.)

On the return for the year 1949, taxpayers indicated an income tax due of $312. Attached to the face thereof and made a part of the return was a note reading as follows: "Tax $312.00 less: Overpayment due to 1945 declaration estimated tax payment (block No. 1676) $94.00, balance of tax $218.00, 25% penalty $53.00, interest at 6% to November 15, 1952, $34.88, total $305.88." (R. 21.)

Maria Repetti, sometimes herein referred to as the taxpayer, and her husband never filed any claim for refund or credit of their 1945 estimated tax payments other than that which was made by filing on October 23, 1952, the delinquent joint income tax returns for the calendar years 1948 and 1949. (R. 21.)

On December 15, 1952, the Director of Internal Revenue served on taxpayer a notice of mathematical

error under the provisions of Section 272(f) of the Internal Revenue Code of 1939, asserting that the credit taken on the 1948 return was not allowable because the time had expired within which credit could be taken for the estimated tax payment in 1945. On December 12, 1952, a similar notice was served on taxpayer relative to the tax year 1949. (R. 7-10.) The Director thereupon levied an assessment against taxpayer in the amount of $260.48, covering $176 income tax, $44 penalty, and $40.48 interest for 1948 (R. 7-8), and another assessment in the amount of $132.97 covering income taxes, penalties and interest for 1949 (R. 8-10).

Taxpayer then brought these actions to enjoin distraint of her property pursuant to the assessments, and to secure their removal from the assessment list. (R. 4, 6.) The District Court granted the relief sought on the ground that the credits taken by taxpayers were not in the nature of mathematical errors, and that the Commissioner should have issued deficiency notices before assessing taxpayers as provided in Section 272(a)(1) of the Internal Revenue Code of 1939. (R. 22-25.)

SUMMARY OF ARGUMENT.

A taxpayer may be assessed without issuance of a deficiency notice for the amount of taxes shown to be due on his return. Where the tax imposed, however, exceeds the amount shown as the tax by the taxpayer upon his return, the Commissioner must issue a de-

ficiency notice before assessing the tax. Taxpayer here showed on her returns for 1948 and 1949 a certain amount of tax liability for those years, but claimed as a credit against that liability a certain payment of estimated income tax made by her in 1945. The Commissioner assessed taxpayer for the amount of taxes shown on her returns for 1948 and 1949 and not paid. The Commissioner did not issue deficiency notices before doing so because there was no deficiency for these years within the meaning of the statute. The tax imposed did not exceed the amounts shown as the tax by the taxpayer upon her return.

Section 271(b) of the Internal Revenue Code of 1939 provides that the tax imposed by Chapter 1 of the Internal Revenue Code of 1939 and the tax shown on the return shall both be determined without regard to payments on account of estimated tax. Since the payment taxpayer wishes to credit against her taxes due for 1948 and 1949 was made as an installment of estimated tax in 1945, it should *a fortiori* not be considered in determining the taxes due in 1948 and 1949. Section 322(d) of the Internal Revenue Code of 1939 also shows that payment and overpayment do not enter into the determination of a deficiency, so that the payment made by taxpayer in 1945 cannot be considered in determining whether there was a deficiency in 1948 and 1949.

The purpose of the injunction sought by taxpayer is to assure her the benefit of the administrative process before deficiencies are assessed. This includes

recourse to the Tax Court within ninety days of the issuance of the deficiency notice. But in order to determine in this case whether the payment of estimated tax made by taxpayer in 1945 may apply as a credit against her liability for 1948 and 1949, the Tax Court would have to determine her correct liability for 1945. This it would be without jurisdiction to do for the reason that only the years 1948 and 1949 would be before the Court, and Section 272(g) forbids it to determine whether or not the tax for any year not before it has been overpaid or underpaid. Therefore it would avail taxpayer nothing to force the issuance of a deficiency notice here, because the Tax Court would be unable to decide the problem. The assessments made by the Commissionr should be allowed to stand bcause taxpayer has no other recourse under any circumstances but to pay them and sue to recover the amounts paid.

ARGUMENT.

I.

ASSESSMENT OF A TAX NEED NOT BE PRECEDED BY THE ISSUANCE OF A DEFICIENCY NOTICE WHERE THE AMOUNT ASSESSED DOES NOT EXCEED THE AMOUNT SHOWN AS THE TAX BY THE TAXPAYER UPON HIS RETURN.

When a taxpayer submits his return showing a certain amount of tax due, but fails to pay the money, the Commissioner is authorized and required to make an assessment for it. Section 3640, Internal Revenue Code of 1939 (Appendix, *infra*); *United States v. Erie Forge Co.,* 191 F. 2d 627 (C.A. 3d),

certiorari denied, 343 U.S. 930, rehearing denied, 343 U.S. 970. However, if the Commissioner determines that the taxpayer owes more taxes than indicated by his return, a condition generally known as a deficiency, the Commissioner cannot immediately assess the taxpayer for the difference. He must follow a certain procedure under these circumstances. A vital part of that procedure is set out in Section 272(a)(1) of the Internal Revenue Code of 1939 (Appendix, *infra*), providing that the Commissioner is authorized to send notice of such deficiency to the taxpayer. Within ninety days after such notice is mailed, the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. No deficiency may be assessed, nor distraint or proceeding in court prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Court has become final. Moreover, notwithstanding the provisions of Section 3653(a) of the Code (Appendix, *infra*) which generally forbid suits by taxpayers to restrain assessment or collection of taxes, the making of an assessment or the beginning of a distraint or proceeding in Court during the time such prohibition is in force may be enjoined by a proceeding in the proper Court. Taxpayer here has brought this action to enjoin the collection of taxes on the theory that the Commissioner has assessed deficiencies against her without first sending her notice of the deficiencies, and thus she has been deprived of that ninety-day

period during which she could have filed a petition with the Tax Court for a redetermination of those deficiencies.

It is the position of the Director here that the assessments for the years 1948 and 1949 in question were legal despite the Commissioner's failure to issue deficiency notices because the Commissioner was merely trying to collect taxes the amount of which taxpayers admitted on the returns for those years, and was not asserting any deficiency against taxpayers. The issue turns upon the interpretation of the word "deficiency" which is defined in Section 271(a) of the Internal Revenue Code of 1939 (Appendix, *infra*) as follows:

> (a) *In General.*—As used in this chapter in respect of a tax imposed by this chapter, "Deficiency" means the amount by which the tax imposed by this chapter exceeds the excess of—
>
> (1) the sum of (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over—
>
> (2) the amount of rebates, as defined in subsection (b)(2), made.
>
> * * * * * * *

For purposes of this case the definition may be simplified to "the amount by which the tax imposed by this chapter exceeds * * * the amount shown as the tax by the taxpayer upon his return * * *."

The Director submits that the words "amount shown as the tax by the taxpayer upon his return" mean exactly what they say, and that taxpayer showed $176 as such amount in 1948 and $312 as such amount in 1949. Since each of these amounts (plus interest and penalties which are not deficiencies (*United States v. Erie Forge Co., supra;* cf. *Hastings & Co. v. Smith* (C.A. 3d), decided July 12, 1955 (1955 P-H, par. 72,833), reversing, 122 F. Supp. 604 (E.D. Pa.)), equals the amount of tax imposed by this chapter for those years, the excess of the latter over the amount shown as the tax by the taxpayer upon his return is zero, and therefore there is no deficiency. The Director's position is supported by *Jackson Iron & Steel Co. v. Commissioner,* 54 F. 2d 861 (C.A. 6th), certiorari denied, 286 U.S. 549, in which the Sixth Circuit held that a "deficiency" assessment did not result where the Commissioner finally determined an income tax for the year 1918 which was $13,672.93 less than the amount shown on the face of that taxpayer's return but which was $50,127.21 more than the amount admitted by the taxpayer to be due in an application for special relief under Sections 327 and 328 of the Revenue Act of 1918, c. 18, 40 Stat. 1057. In rejecting the contention of the taxpayer there made the Court also pointed out that the provisions of the statute involved are not ambiguous.

We respectfully submit that *Maxwell v. Campbell,* 205 F. 2d 461 (C.A. 5th), relied upon by the District Court, is distinguishable from the instant case. That case was argued by the taxpayers on the theory that

the Commissioner had, without issuing a deficiency notice, assessed taxes in excess of the amount of tax shown by the taxpayers on their return. The Court took notice of that fact in its opinion as follows (p. 462): "In addition, they [taxpayers] pointed out that the principal amount of each assessment was in excess of the amount shown by the return."

Hastings & Co. v. Smith, 122 F. Supp. 604 (E.D. Pa.), cited by the District Court (R. 33), was also a case in which the tax imposed exceeded the amount shown on the return. It involved a true deficiency, and the trial Court held that interest claimed by the Government on this deficiency was entitled to the same administrative treatment as the deficiency itself, that is, a deficiency notice prior to assessment. But even this latter ruling was reversed by the Court of Appeals for the Third Circuit under date of July 12, 1955 (1955 P-H, par. 72,833), which held that because the taxpayer there had consented to the collection of the deficiency in tax the notice provisions of Section 272(a) are not applicable, and the interest could be assessed and collected independently. The case does not in any sense support taxpayer's contention that assessment of the principal amount shown here as the tax on the taxpayer's return (or a part thereof) plus interest thereon must be preceded by a deficiency notice.

The Commissioner here has not assessed principal amounts in excess of the amounts shown on taxpayer's returns. Such principal amounts were the very amounts returned by taxpayer or less. Hence

there is no deficiency for which the Commissioner could issue a deficiency notice.

II.

THE PAYMENT MADE BY TAXPAYER ON ACCOUNT OF ESTIMATED TAX IN 1945 CANNOT BE CONSIDERED IN DETERMINING THE EXISTENCE OF A DEFICIENCY FOR THE YEARS 1948 AND 1949.

Taxpayer's argument that the assessment made by the Commissioner was in fact a deficiency assessment depends ultimately upon the fact that taxpayer made a payment of estimated tax in 1945. Without that payment, taxpayer would without question have owed the taxes shown on the 1948 and 1949 returns. We submit that the Internal Revenue Code of 1939 forbids the consideration of that payment in the determination of deficiencies. Section 271(b) (Appendix, *infra*) provides that the tax imposed by Chapter 1 and the tax shown on the return shall both be determined without regard to payments on account of estimated tax. *Keefe v. Commissioner,* 15 T.C. 947; *Redcay v. Commissioner,* 12 T.C. 806. The payment upon which taxpayer relies was a payment on account of estimated tax, and this for a year (1945) not involved in the Commissioner's assessments. (R. 17.) It should not therefore be considered in computing the difference between the tax imposed and the tax shown on the returns for the years 1948 and 1949. The difference then is zero, and there is no deficiency within the meaning of Section 271(a) of the Internal Revenue Code of 1939 for these latter years.

This position of the Director is further supported by Section 322(d) of the Code (Appendix, *infra*), which authorizes the Tax Court to determine overpayments where timely claim for refund has been filed. That section provides that if the Tax Court finds that there is no deficiency, and further that taxpayer has made an overpayment—

> in respect of the taxable year in respect of which the Commissioner determined the deficiency, or finds that there is a deficiency but that the taxpayer has made an overpayment of tax in respect of such taxable year, the Tax Court shall have jurisdiction to determine the amount of such overpayment, * * *.

Thus payment and overpayment do not enter into the determination of a deficiency; otherwise there could not be a deficiency and an overpayment for the same year. Applied to the instant case, this means that the 1945 payment made by taxpayer cannot be taken into consideration in determining whether there was a deficiency in 1948 and 1949. Without the 1945 payment, taxpayer has no argument at all to support her position that the Commissioner was asserting such a deficiency, and this payment we submit should be completely disregarded here.

III.

THE PURPOSE OF THE INJUNCTION SOUGHT BY TAXPAYER IS TO ASSURE HER THE BENEFIT OF THE ADMINISTRATIVE PROCESS INCLUDING RECOURSE TO THE TAX COURT, BUT HERE THE TAX COURT WOULD BE WITHOUT JURISDICTION TO ADJUDICATE TAXPAYER'S CLAIMED DEFICIENCY, SO THE INJUNCTION WOULD BE WITHOUT PURPOSE.

If the Commissioner in this case had issued a ninety-day letter, as taxpayer insists he should have, taxpayer would then have had two alternatives. She could have paid the tax claimed by the Commissioner, and sued to recover it (Section 3772(a), Internal Revenue Code of 1939 (26 U.S.C. 1952 ed., Sec. 3772); 28 U.S.C., Section 1346), or she could have filed a petition with the Tax Court for a redetermination of the deficiency. Section 272(a)(1) of the Internal Revenue Code of 1939. To follow the first alternative, taxpayer needed no ninety-day letter. As stated, she could have paid the tax claimed by the Commissioner at any time and sued to recover it. Presumably, therefore, taxpayer wished to petition the Tax Court. We submit that this would have proved a barren course, and that the Tax Court would have found itself without jurisdiction to decide the case on the merits.

The gist of taxpayer's case is that a payment made in connection with her estimated tax for 1945 should have been credited to the years 1948 and 1949 which are in question here.* This would necessarily require

*Taxpayer is plainly wrong on the merits of this issue because the statute of limitations in Section 322(b)(1), Internal Revenue Code of 1939 (Appendix, *infra*), has run on any credit or refund

a determination by the Tax Court as to whether there was an overpayment in 1945. But the year 1945 would not be before the Court which would therefore be unable to decide the problem; for the Tax Court has no jurisdiction to determine the year or years to which the Commissioner should apply a credit for the overpayment of tax for a year not before it. Section 272(g) of Internal Revenue Code of 1939 (Appendix, *infra*). The Tax Court acquires jurisdiction only where, and for the year in which, the Commissioner asserts a deficiency; and it has nothing to do with matters of collection. *F. A. Gillespie Trust v. Commissioner,* 21 T.C. 739; *Gould-Mersereau Co. v. Commissioner,* 21 B.T.A. 1316; *Dickerman & Englis, Inc. v. Commissioner,* 5 B.T.A. 633.

The severity with which this statutory provision is applied appears in the case of *Commissioner v. Gooch Co.,* 320 U.S. 418. Because of an error in valuation of inventory, taxpayer there overpaid its 1935 income tax. Subsequently when the inventory was revalued, it resulted in a decrease in the 1935 tax and an increase in the 1936 tax. The statute of limitations barred refund of the 1935 overpayment. The Commissioner determined a deficiency in the 1936 tax, and

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of an estimated tax paid in 1945. The estimated tax was deemed to have been paid on March 15, 1946. Section 322(e), Internal Revenue Code of 1939. (Appendix, *infra.*) Since no claim for credit or refund was made until the filing of the 1948 and 1949 returns on October 23, 1952 (if those returns can be considered such), the time to claim a credit or refund expired two years after March 15, 1946, and taxpayer's claim on October 23, 1952, was too late. It is to be further noted that under Section 3775(b) of the Code (26 U.S.C. 1952 ed., Sec. 3775), a credit of an overpayment in respect of any tax "shall be void" if at the time a refund of such overpayment is barred by the statute of limitations.

taxpayer sought to apply the 1935 overpayment to satisfy the 1936 deficiency. It went to the Board of Tax Appeals for a redetermination of taxes for the year 1936. The Supreme Court held that the Board had no power to order a refund or a credit for the year 1935, saying (p. 420):

> The Board is confined to a determination of the amount of deficiency or overpayment for the particular tax year as to which the Commissioner determines a deficiency and as to which the taxpayer seeks a review of the deficiency assessment. Internal Revenue Code, §§ 272, 322(d). It has no power to order a refund or credit should it find that there has been an overpayment in the year in question. * * * Section 272(g) of the Internal Revenue Code specifically provides that "the Board in redetermining a deficiency in respect of any taxable year shall consider such facts with relation to the taxes for other taxable years as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the tax for any other taxable year has been overpaid or underpaid."

Applying these principles to the case before it the Court continued (p. 421):

> neither the fact that the prior overpayment could no longer be refunded nor the fact that the overpayment exceeded the amount of the deficiency had any relevance whatever to the redetermination of the correct tax for the 1936 fiscal year. The respondent, in other words, was seeking to have the 1935 overpayment used, not as an aid in redetermining the 1936 deficiency, but as an affirmative defense or offset to that deficiency. This

> necessarily involved a determination of whether there was an overpayment during the 1935 fiscal year. The absolute and unequivocal language of the proviso of § 272(g), however, placed such a determination outside the jurisdiction of the Board. Thus to allow the Board to give effect to an equitable defense which of necessity is based upon a determination foreign to the Board's jurisdiction would be contrary to the expressed will of Congress.

We submit that if taxpayer prevails in this action, requiring the Director to issue a notice of the determination of deficiencies for 1948 and 1949, taxpayer's only course which is not already open to her will be to petition the Tax Court for a redetermination of such deficiencies. In the Tax Court she will inevitably be met with the *Gooch* case. The petition for redetermination will be dismissed, and taxpayer will be in the same position she is in now, except that she will have contributed to an increase of fruitless litigation rather than the diminution of it.

The District Court was under the impression that because a small amount of money is involved here the Director wants to collect it without regard for taxpayer's rights. We earnestly submit that this is not so. On the other hand it clearly appears that this is not an appropriate situation for resort to an injunction by a taxpayer, whatever the amount of money involved. This Court itself has stated that the injunctive relief provided by Section 272(a)(1) is (*Ventura Consolidated Oil Fields v. Rogan,* 86 F. 2d 149, 154-155 (C.A. 9th), certiorari denied, 300 U.S. 672) "for the

specific purpose of assuring taxpayer that a claimed deficiency shall be determined by the administrative process and adjudication by the Board of Tax Appeals provided by the statute." For two reasons, as pointed out above, taxpayer here does not meet the purpose laid down by this Court. First, there is no claimed "deficiency" within the meaning of the statute, and, secondly, adjudication of the issue taxpayer wishes to raise is beyond the statutory jurisdiction of the Tax Court.

CONCLUSION.

For the reasons stated, the decree of the District Court should be reversed and taxpayer's action dismissed.

Respectfully submitted,

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September, 1955.

(Appendix Follows.)

Appendix.

Appendix

Internal Revenue Code of 1939:

SEC. 271 [As amended by Sec. 14(a) of the Individual Income Tax Act of 1944, c. 210, 58 Stat. 231]. DEFINITION OF DEFICIENCY.

(a) *In General.*—As used in this chapter in respect of a tax imposed by this chapter, "deficiency" means the amount by which the tax imposed by this chapter exceeds the excess of——

(1) the sum of (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over——

(2) the amount of rebates, as defined in subsection (b)(2), made.

(b) *Rules for Application of Subsection (a).*—For the purposes of this section——

(1) The tax imposed by this chapter and the tax shown on the return shall both be determined without regard to payments on account of estimated tax, without regard to the credit under section 35, and without regard to so much of the credit under section 32 as exceeds 2 per centum of the interest on obligations described in section 143(a);

* * * * * * *

(26 U.S.C. 1952 ed., Sec. 271.)

SEC. 272 [As amended by Sec. 203(a) of the Act of December 29, 1945, c. 652, 59 Stat. 669]. PROCEDURE IN GENERAL.

(a)(1) *Petition to Tax Court.*—If in the case of any taxpayer, the Commissioner determines

that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. * * *

* * * * * * *

(g) *Jurisdiction Over Other Taxable Years.*—The Tax Court in redetermining a deficiency in respect of any taxable year shall consider such facts with relation to the taxes for other taxable years as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the tax for any other taxable year has been overpaid or underpaid.

* * * * * * *

(26 U.S.C. 1952 ed., Sec. 272.)

SEC. 322. REFUNDS AND CREDITS.

* * * * * * *

(b) *Limitation on Allowance.*—

(1) *Period of limitation.*—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

* * * * * * *

(d) [As amended by Sec. 169(b) of the Revenue Act of 1942, c. 619, 56 Stat. 798, and Sec. 14(d) of the Individual Income Tax Act of 1944, *supra*] *Overpayment Found by Tax Court.*—If the Tax Court finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, or finds that there is a deficiency but that the taxpayer has made an overpayment of tax in respect of such taxable year, the Tax Court shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Tax Court has become final, be credited or refunded to the taxpayer. * * *

(e) [As amended by Sec. 4(b) of the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126] *Presumption as to Date of Payment.*— * * * For the purposes of this section, any amount paid as estimated tax for any taxable year shall be

deemed to have been paid not earlier than the fifteenth day of the third month following the close of such taxable year.
(26 U.S.C. 1952 ed., Sec. 322.)

SEC. 3640. ASSESSMENT AUTHORITY.

The Commissioner is authorized and required to make the inquiries, determinations, and assessments of all taxes and penalties imposed by this title, or accruing under any former internal revenue law, where such taxes have not been duly paid by stamp at the time and in the manner provided by law.

(26 U.S.C. 1952 ed., Sec. 3640.)

SEC. 3653. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) *Tax.*—Except as provided in sections 272 (a), 871(a) and 1012(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

* * * * * * *

(26 U.S.C. 1952 ed., Sec. 3653.)

NO. 14825

In the
United States
Court of Appeals
for the Ninth Circuit

GLEN T. JAMISON,
Director of Internal Revenue,
Appellant,

vs.

MARIA REPETTI,
Appellee.

On Appeal From The Judgment Of The United States District Court For The Northern District of California

Brief for the Appellee

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MULDOWNEY PRINTING CO.

CONTENTS

CITATIONS

Page

CASES:

STATUTES:

1939 Internal Revenue Code (26 U.S.C.)

No. 14,825

IN THE

United States Court of Appeals

For the Ninth Circuit

GLEN T. JAMISON, Director of Internal Revenue

Appellant,

vs.

MARIA REPETTI,

Appellee.

On Appeal from the Judgment of the United States District Court for the Northern District of California.

BRIEF FOR THE APPELLEE

OPINION BELOW

The opinion of the District Court granting plaintiff-appellee's Motion for Summary Judgment, and its opinion and order denying defendant-appellant's Motion for Reconsideration are reported at 131 Fed. Sup. 626 and set forth in the transcript, beginning on pages 22 and 31, respectively.

JURISDICTIONAL STATEMENT

This appeal involves individual Federal income taxes and jurisdiction is conferred on this court by 28 U.S.C., Section 1291.

QUESTIONS PRESENTED

1. Whether the assessment made by defendant-appellant was for a mathematical error which, under Section 272(f), 1939 I.R.C., relieves the defendant-appellant from the duty of issuing a statutory notice under Section 272(a), 1939 I.R.C.

2. If not a mathematical error, was the action of the District Court in granting the injunction proper under Section 272(a), 1939 I.R.C.

STATUTES INVOLVED

INTERNAL REVENUE CODE OF 1939:

SECTION 272. PROCEDURE IN GENERAL.

(a) (1) *Petition to The Tax Court of the United States.*

If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day) the taxpayer may file a petition with the Tax Court of the United States for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Nothwithstanding the provisions of section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court . . . . .

(f) *Further Deficiency Letters Restricted.* . . . If the taxpayer is notified that, on account of a mathematical error appearing upon the face of the return, an amount of tax in excess of that shown upon the return is due, and that an assessment of the tax has been or will be made on the basis of what would have been the correct amount of tax but for the mathematical error, such notice shall not be considered (for the purposes of this subsection, or of subsection (a) of this section, prohibiting assessment and collection until notice of deficiency has been mailed, or of section 322(c), prohibiting credits or refunds after petition to the Board of Tax Appeals) as a notice of a deficiency, and the taxpayer shall have no right to file a petition with the Board based on such notice, nor shall such assessment or collection be prohibited by the provisions of subsection (a) of this section.

SECTION 3640. ASSESSMENT AUTHORITY.

The Commissioner is authorized and required to make the inquiries, determinations and assessments of all taxes and penalties imposed by this title, or accruing under any former internal revenue law, where such taxes have not been duly paid by stamp at the time and in the manner provided by law.

STATEMENT OF THE CASE

The original complaint (Tr. page 3) was filed by plaintiff-appellee on November 5, 1953, seeking an injunction against defendant-appellant on the collection of assessments made by him on or about December 12, 1952, in accordance with the provisions of Section 272(f), 1939 I.R.C., copies of which notices of assessment were annexed to the complaint (Tr. pages 7 and 8). Motion by defendant-appellant to dismiss

(Tr. page 11) was denied on April 7, 1954 (Tr. page 12). On February 4, 1955, the District Court granted plaintiff-appellee's Motion for Summary Judgment (Tr. page 22), and on February 11, 1955, defendant-appellant moved for a rehearing (Tr. page 26) which was denied (Tr. page 31) on April 18, 1955, with an entry of judgment on June 21, 1955 (Tr. page 36).

FACTS OF THE CASE

The facts of the case as set forth by defendant-appellant in his brief under the heading of "Statement" on page 3, is a correct statement of the facts pertinent to this case.

ARGUMENT

Defendant-appellant does not argue that the assessment is valid as a "mathematical error" under Section 272(a), 1939 I.R.C. He seeks validity on the assertion without too much authority (Br. page 6) that Section 3640, 1939 I.R.C. sanctions any and all assessments of the Commissioner. Taxpayer contends that such Code section merely designates the Commissioner as the assessment officer for assessments otherwise provided, and the procedure therefore, in the Code. Defendant-appellant relies most strongly on the argument that the disputed liability was not a deficiency, hence denying to taxpayer the administrative procedure and right of appeal provided by Section 272(a) of the Internal Revenue Code. The District Court recognized the inherent abuse in such a rule.

It is noteworthy that most of defendant-appellant's brief is devoted to raising issues of law not here appropriate, and which was the very arbitrary action condemned by this Court in *Ventura Consolidated Oil Fields v. Rogan,* 86 F. 2d 149, Cert. Den. 300 U.S. 672, relied upon by the District Court in this case (Tr. page 25). This diversionary tactic is comparable to defendant-appellant's threat in the District Court (Tr. page 34) to re-assess under the new 1954 Code in order to make that and this Court's action moot.

If the assessment was not proper under Section 272(f), 1939 I.R.C., is it *per se* invalid, or can the defendant-appellant now cure the defect by resorting to the claim of a general power of assessment under Section 3640, 1939 I.R.C., merely because the Commissioner is designated as the assessment officer? Section 271, relied upon by the defendant-appellant, grants no assessment authority, and no other is suggested by the defendant-appellant.

The contention that Section 271(b) (1), 1939 I.R.C., bars the credit against tax for carry-over from previous years was well answered by the District Court (Tr. page 3). That section relates to the fact of current payments, and not to overpayment of taxes that the taxpayer elects on his return to take either as a refund or as a reduction of the succeeding year's tax liability. If he elects the latter, as in this case (carry-over until absorbed) and by such action raises the issue of the bar of the statute of limitations (Br. page 11, Argument II),

then such issue is one of law and not of fact under Section 271(b) (1), 1939 I.R.C. The issue is not whether the payment was made, but whether taxpayer is entitled to the credit—one of many provided in the Code.

Defendant-appellant's reference to *United States v. Erie Forge,* 191 F. 2d 627 (CA3d) (Br. page 9) is not appropriate, as that case involved the delinquency penalty under Section 291. The Court found that such a penalty was not a deficiency, saying that "in order to decide as we do it is only necessary to consider the language of the section which imposes these penalties and prescribes their method of selection." There follows an analysis by the Court of Sections 291 and 293, 1939 I.R.C., which determines the Court's opinion in that case.

There is no doubt but that the issue of whether the taxpayer is entitled to the carry-over credit of the estimated tax payment is a question of law. According to the position of the defendant-appellant, the taxpayer here is completely without any redress unless she were to pay the amount claimed by the defendant-appellant and file claim for refund. Defendant-appellant argues that the issuance of the statutory notice under Section 272(a) would be futile because the Tax Court would be without jurisdiction (Br. page 13). Such a position negates the very purpose and justification of the Tax Court. Defendant-appellant's argument would have us believe that there are two methods of asserting additional tax liability — one method for a class that can

be challenged *only* after claim for refund followed by suit in the district court, and the other for a class which may *in addition* be tried in the Tax Court pursuant to Section 272(a).

We fail to find statutory authority for such a position.

The issues raised by defendant-appellant in Argument II. and III. (Br. pages 11 and 13) are not properly before this Court, intended, no doubt, to demonstrate the futility of this Court's action should it affirm the District Court's order. It is respectfully suggested that the proper procedure to test defendant-appellant's argument is to give him the opportunity to issue the statutory notice under Section 272(a), 1939 I.R.C., and if it is improper, the Tax Court will recognize it and rule accordingly. Appellee does not agree with defendant-appellant's position, but does not want to acquiesce by argument in this diversion from the proper issues before this Court, principally whether this particular assessment was valid.

SUMMARY

The facts in this case clearly indicate that defendant-appellant erred in his choice of authority for the assessment by claiming it was a mathematical assessment under Section 272(f), and that such assessment is, therefore, invalid. He now seeks to justify the assessment on the ground that he had the authority to make any assessment under Section 3640, 1939 I.R.C. without regard to any other provi-

sions of the Internal Revenue Code. In addition, he argues that Section 272(a), 1939 I.R.C., which affords a protection to the taxpayer from arbitrary assessment is not appropriate because that particular section requires a "deficiency", whereas this particular assessment is not a "deficiency", as defined in Section 271, 1939 I.R.C. Under the facts of this case, we submit that such rationale clearly supports the opinion of the lower court that defendant-appellant's actions were intended to frustrate the Internal Revenue Code by denying to the taxpayer his right to administrative procedure and to litigate before the Tax Court. Defendant-appellant clearly admits that whether plaintiff-appellee is entitled to the carry-over credit for estimated tax is a matter of law, and there is no question of the fact of payments, which really is the subject of Section 271 (b) (1), 1939 I.R.C. Unless Section 3640, 1939 I.R.C. endows the defendant-appellant with the right to assess without restriction, defendant-appellant has failed to show any statutory authority for making the assessment, either indirectly or directly.

DATED at Stockton, California, this first day of November, 1955.

Respectfully submitted,

SEAMAN & DICK,
By Wareham Seaman
(Attorneys for Appellee)

No. 14,826

IN THE

United States Court of Appeals

For the Ninth Circuit

AMANDO SULIMENARIO LUMANTES,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Northern District of California.

BRIEF FOR THE UNITED STATES.

LLOYD H. BURKE,
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Attorneys for Appellee.

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Subject Index

Table of Authorities Cited

Cases

Statutes

Rules

No. 14,826

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BRIEF FOR THE UNITED STATES.

I. STATEMENT OF THE CASE.

A. The Proceedings Below.

On May 7, 1953 the Government filed a complaint in the United States District Court for the Northern District of California to revoke and set aside the order admitting appellant to citizenship and to cancel his certificate of naturalization on the grounds of concealment of a material fact and wilful misrepresentation. When the matter came on for trial on September 29, 1954 appellant did not appear, his counsel having been unable to locate him (R. 53). The

Government introduced documentary evidence (Petitioner's Exhibits Nos. 1 through 8 and No. 10, set forth in the Appendix), and the case was continued for submission.

Thereafter counsel for the Government discovered that appellant was in a federal penitentiary in Connecticut, having been convicted of conspiracy to import, transport and conceal narcotic drugs and of the substantive offenses on May 21, 1954 in the United States District Court for the District of New Jersey. (R. 102). Written interrogatories were propounded to appellant (R. 22) and answered (R. 29-32). After appellant's transfer to a penitentiary on the West Coast, he was brought to San Francisco upon a writ of habeas corpus ad testificandum (R. 27) to appear and testify in open court.

On January 21, 1955 the oral testimony of appellant and of the examiner in appellant's naturalization proceeding was taken (R. 65-126, and R. 126-132) and appellant's judgement of conviction was introduced in evidence (Ex. 11). The questions now raised by appellant in this appeal were briefed by the respective counsel and given careful consideration by District Judge Murphy in his written opinion filed March 28, 1955 (R. 33-35). Upon appropriate findings of fact (R. 37-41) the judgment of revocation (R. 42-43) was entered on April 20, 1955.

B. Questions Presented.

Although appellant has made no specification of errors relied upon and has stated the question pre-

sented by merely quoting the language of 8 U.S.C. § 1451, (App.Op.Br. 5) it would appear from appellant's brief that the following questions have been presented:

(1) Is the concealment or misrepresentation of one's marriage a concealment or misrepresentation of a material fact in the meaning of Section 340 of the Immigration and Nationality Act of 1952, 66 Stat. 260, 8 U.S.C. § 1451 (1952)?

(2) Did the Government prove by clear, unequivocal and convincing evidence that appellant concealed and wilfully misrepresented his marital status in the naturalization proceeding?

C. Statement of Facts.

1. Appellant's Background.

Appellant was born in 1916 in the Philippine Islands, where he was educated through the seventh grade (R. 65-66). He entered the United States in 1931 and has resided here continuously except for trips outside the country as a merchant seaman (R. 66). Appellant attended Hayward Union High School after his arrival in this country, and has been able to speak, understand, read, and write the English language without difficulty for many years (R. 66). He writes with particular facility and his choice of language is good (e.g. R. 30-31; R. 90-91).

2. The Misrepresentations.

On April 7, 1947 appellant filed with the Immigration and Naturalization Service a form N-400, en-

titled Application for a Certificate of Arrival and Preliminary Form For Petition For Naturalization, (Ex. 1). Appellant personally prepared the form on a typewriter, (R. 74-75) and certified therein that he had never been married. Questions as to marital status and children were left unanswered.

On October 14, 1948 appellant was questioned orally by naturalization examiner C. A. Antonioli regarding each entry on his preliminary form N-400 (R. 128-129). When an oral answer was the same as the written entry, a checkmark was placed by the question. Where any answer was changed, this was noted in writing by the examiner (R. 128). Appellant having orally stated that he was not married and that he had no children, the examiner entered these answers on the form (R. 129, Ex. 1, p. 3). Appellant's petition for naturalization (Ex. 2) was then prepared, containing a statement that he was not married and with all of the entries relating to his marriage and to his wife and children left blank. Appellant signed the petition for naturalization, swearing to the truth of the contents thereof (R. 131). The petition was granted and a decree of naturalization was entered in the United States District Court for the Northern District of California on December 13, 1948.

On December 9, 1946, previous to any stage of the naturalization proceeding, appellant had married Angela Munar in the Philippine Islands. At the time appellant executed his petition for naturalization, Angela Munar had two children, one by a previous marriage and one whose paternity was left in consid-

erable doubt by appellant's testimony (R. 67-71). Appellant claimed that the second child was born before his marriage to Angela Munar and was not his child (R. 96-99). However, he admitted that he had told customs officers in February, 1954 that he was the father of two children, aged 4 and 6, which would mean that the older child was born in 1947 or 1948 (R. 67-70). Appellant then claimed that he had corrected that statement at a later time to show that only the 4 year old was actually his child (R. 69-70).

3. Admissions in 1951 and 1952.

On June 1, 1951, shortly after the falsity of appellant's naturalization petition was discovered, a sworn statement was taken from appellant by immigration inspectors, a copy of which statement was introduced as Petitioner's Exhibit No. 7 set forth in the Appendix. Appellant was confronted with the naturalization forms and the proof of his earlier marriage (Ex. 7, p. 2). He first claimed that the preliminary form N-400 was filed prior to the marriage, but it was shown to appellant that the entries on the form established that he had prepared it and filed it in 1947, after the marriage (Ex. 7, p. 3). After considering the matter for some 15 minutes, appellant claimed that the marriage contract (Ex. 6) was a false document, that he was not married and that Angela Munar had procured the document by means unknown to him (Ex. 7, p. 4-6). His sworn testimony was to the effect that he and Angela Munar had conspired to present a false petition for immigration visa with full knowledge of the illegality thereof (Ex. 7, p. 6-7).

On June 4, 1951 appellant was questioned again and repudiated his previous statement, admitting that he had lied because he did not wish to lose his citizenship, (Ex. 8, p. 2-3). Appellant claimed that he had submitted his preliminary form in 1946, merely completing the entry as to place of residence when he returned in 1947 (Ex. 8, p. 2, 4). When reminded of the fact that the form showed on its face that it was prepared in 1947, appellant said "There is no statement I could make right now. I don't know why . . . I could not say why I put down I was never married, and I was still married." (Ex. 8, p. 4). He readily admitted that he had been asked orally by the Naturalization Examiner whether or not he was married and that he had said "No." (Ex. 8, p. 5). Appellant claimed that he did not know why he had made the statement to the examiner (Ex. 8, p. 5).

On May 28, 1952 appellant was examined under oath and again stated that he did not know why he had falsely denied that he was married (Ex. 10, p. 1). He admitted that he had asked his wife for a divorce the last time he saw her (Ex. 10, p. 2). Appellant also admitted on the witness stand that he had wanted a divorce since 1950 (R. 124) and that he was keeping company with a woman at the time of his narcotics arrest (R. 125-126). From these facts it is reasonable to infer that one motive for lying was appellant's desire to remarry in this country without the necessity of dissolving his Philippine marriage.

4. Appellant's Trial Testimony.

In his answers to written interrogatories (R. 22 and R. 29-32) and on the witness stand appellant gave an entirely new and different version of the naturalization proceedings. He claimed that he had submitted a hand-written preliminary form in 1945 rather than in 1946 and that the form had been returned to him because it was incomplete in some minor particular (R. 72-76). This was directly contrary to the testimony of naturalization examiner C. A. Antonioli, who stated that preliminary forms are never returned for that reason (R. 130). Appellant testified that in typing his preliminary form in 1947 he had merely copied all of the information from the previous form that he had acted, to quote his own words "without careful consideration of the change of my marital status." (R. 76). He admitted, however, that he did think to bring the form up to date in all other particulars, such as places and dates of residence (R. 76-77).

Contrary to his previous sworn testimony (Ex. 8, p. 4-5) appellant denied on the witness stand that he had any recollection as to whether he was orally asked whether or not he was married and if he had any children (R. 79-80). Appellant then switched to a new position, claiming that any falsification during his oral examination in 1948 was due to confusion and a lack of understanding of the questions (R. 95). When confronted with the fact that he had not given this "confusion" explanation when he was asked about it in 1951, he attempted to evade the question and finally claimed that he hadn't remembered the explanation at that time (R. 94-96).

Appellant was completely evasive and inconsistent in his testimony regarding the June 1, 1951 and June 4, 1951 statements. Although it had been stipulated that all three of the sworn statements were true and complete, (R. 51-52), appellant vehemently denied on the witness stand that he had previously branded the marriage contract as a false document and that he had falsely accused his wife in order to protect his own citizenship (R. 84, 86-87). After reexamining the transcripts of these statements he again changed his testimony, deciding that he could not recall whether or not he had lied to the immigration inspectors in 1951.

Appellant was the sole witness in his own behalf and his testimony was, of course, carefully appraised by the trial court. Appellant came to the witness stand impeached by his admitted wilful perjury on June 1, 1951 and by three felony convictions involving smuggling and concealment of narcotics. Appellant was even evasive regarding the narcotic convictions, refusing at first to admit that he knew that he had been convicted of any crime (R. 31-32, R. 102-104). Appellant's testimony was best characterized by District Judge Murphy when he described in his written opinion appellant's "deliberately equivocal and evasive answers when testifying before me." (R. 35). The court simply could not and did not believe the testimony of appellant upon which he relies in this appeal (App.Op.Br. 8-14).

II. ARGUMENT.

A. APPELLANT'S CONCEALMENT AND MISREPRESENTATION OF HIS MARRIAGE WAS CONCEALMENT AND MISREPRESENTATION OF A MATERIAL FACT.

Section 340 of the Immigration and Nationality Act of 1952, 66 Stat. 260, 8 U.S.C. § 1451 (1952) provides for revocation of citizenship "on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation."

Appellant has belabored the point in his brief that naturalization would not have been denied him because of the mere fact that he was married. The district court in the proceedings below was well aware of this, as have been all of the courts which have considered the materiality of questions regarding marital status. However, materiality is not limited to the ultimate questions of fact in determining eligibility for citizenship. As set forth in the complaint (R. 4-5) appellant's concealment of his marriage was material to the naturalization proceedings in three ways: (1) Disclosure of the facts relating to appellant's marital status was a statutory requirement; (2) Appellant's false statements closed off an avenue of inquiry into his moral character and other facets of his eligibility for naturalization; and (3) Appellant's false testimony under oath was itself proof of lack of good moral character.

1. Marital Status Questions Required by Statute.

Congress has clearly dictated that questions relating to marital status must be answered by an applicant

for citizenship. At the time appellant filed his petition for naturalization, Section 322(a) of the Nationality Act of 1940, 54 Stat. 1154, 8 U.S.C. § 732 (1946) expressly provided that the petition for naturalization should contain statements as to the fact of marriage, name of spouse, date and place of marriage, date and place of spouse's birth, entry of spouse into the United States, and residence of spouse. Section 336 of the Act, 54 Stat. 1157, 8 U.S.C. § 736 (1946), required that the certificate of naturalization itself contain information as to the naturalized citizen's marital status.

2. Marital Status as a Field of Investigation of Eligibility.

In determining such qualifications as good moral character and attachment to the principles of the Constitution inquiry must be made into many facets of an applicant's background. Had the appellant revealed his marriage in the naturalization proceedings the ensuing investigation might well have revealed that he had fathered an illegitimate child by Angela Munar or other facts showing a lack of good moral character or perhaps other grounds for denial of naturalization. However, appellant closed off that avenue of inquiry and as the court observed in *United States v. Albertini,* 206 Fed. 133, 136 (D. Mont. 1913), "The United States, deceived, could make no investigation, and accepted his untrue statements as true."

In the *Albertini* case the defendant claimed that he had failed to reveal his marriage because he had "considered" himself the "same as single," and had had

no fraudulent intent. This defense was rejected by the court in revoking naturalization on the ground that it had been secured by misrepresentations and concealment of material facts.

In *United States v. Marcus,* 1 F. Supp. 29 (D.N.J. 1932), another case on all fours with the present appeal, citizenship was revoked, the court observing at page 29:

> "The fact that the respondent was married at the time of naturalization would not have justified the Court in refusing the petition on that ground alone. See 8 USCA § 367.
>
> "The respondent, however, was asking for a great privilege, and it was her duty to be entirely honest in answering the questions propounded to her. The statute required the information to be given. She deliberately stated an untruth, and executed an affidavit, swearing that the statements in the petition were true . . . There has been shown an entire lack of good faith, which amounts to fraud, coming within the terms of the statute."

The statute referred to above was, incidentally, the same enactment (Section 302 of the Nationality Act of 1940) upon which appellant relies in his argument of non-materiality (App.Op.Br. 6). Passed in 1922 in order to change the prior rule as to eligibility of women married to aliens, the statute merely provides that naturalization shall not be abridged because of sex or marriage. It has no bearing on the question of materiality.

Other decisions where misrepresentations as to marital status were held to be alternative grounds for revoking naturalization include:

United States v. Pistilli, 119 F. Supp. 237 (E.D.N.Y. 1954);

United States v. Mira, 41 F. Supp. 224 (S.D. W. Va. 1941);

United States v. Rutman, 27 F. Supp. 891 (S.D.N.Y. 1939).

Misrepresentations as to marital status have also been held to be material in analogous situations in the field of naturalization. It was held that a petition for naturalization would be denied in *In re Zycholc,* 43 F.2d 438 (E.D. Mich. 1930), where the petitioner had concealed her marriage and her maiden name. In *Roberto v. United States,* 60 F.2d 774 (7th Cir. 1932), the court affirmed a criminal conviction where the defendant had falsely stated in a naturalization proceeding that he was a single man. The Court observed at page 775:

> "In view of the nature of the proceedings and the subject of inquiry, such false statement was in respect to a material relevant fact." (citing *United States v. Marcus, supra*).

In *United States ex rel. Karpay v. Uhl,* 70 F.2d 792 (2d Cir. 1934), the court affirmed an order dismissing habeas corpus proceedings, holding that a conviction of perjury for falsely stating that one was unmarried was sufficient grounds for deportation. The court stated at page 793 "That his marital status is a material matter seems beyond question."

The problem of materiality in naturalization proceedings has also arisen where the applicant has concealed arrests or convictions which of themselves would not have barred naturalization, either because the offense occurred prior to the five-year period or because the offense did not prove bad moral character. The courts have uniformly ruled that the misrepresentation was that of a material fact, holding it to be immaterial that the arrest or conviction would not of itself have barred naturalization. *Brenci v. United States,* 175 F.2d 90, 92 (1st Cir. 1949); *United States v. Ascher,* 147 F.2d 544 (2d Cir. 1945); *Stevens v. United States,* 190 F.2d 880, 881 (7th Cir. 1951); *United States v. Corrado,* 121 F. Supp. 75, 78 (E.D. Mich. 1953).

3. False Testimony as Proof of Lack of Good Moral Character.

Appellant, having falsely testified in his preliminary form N-400, in his naturalization petition and in his oral examination, was not and had not been for the five-year period a person of good moral character. In *Del Guercio v. Pupko,* 160 F.2d 799 (9th Cir. 1947), this Court held that concealment of two misdemeanor convictions, neither of which reflected adversely upon the petitioner's moral character, required that the petition for naturalization be denied. The Court said:

> "Appellee's grave fault lay in her falsification of a matter concerning which the government was obviously entitled to be informed. . . . Should the courts condone these deceitful practices the whole procedure preliminary to naturalization would be

> effectively undermined and the declared purpose of Congress frustrated. . . . Clearly, the perpetration of such a fraud upon the government in the very process of naturalization involves moral turpitude and exhibits the unfitness of the applicant for the high privilege of citizenship."

The *Del Guercio* decision has, of course, been followed in cases where the question was revocation rather than denial of a petition. Eg. *United States v. Anastasio,* 120 F. Supp. 435, 440 (D.N.J. 1954). In *United States v. Corrado,* 121 F. Supp. 75, 78 (E.D. Mich. 1953), the court quoted the *Del Guercio* decision and said:

> "A fortiori, if an applicant is refused citizenship because the government caught him in making a false statement in his application for citizenship, should any naturalized person be permitted to keep his citizenship as a reward for having been successful in his deceit? We cannot follow that kind of reasoning. Since the information concealed was asked, and a truthful answer might possibly have prevented defendant from obtaining his citizenship in the first instance, the misrepresentation was clearly material."

In *United States v. Forrest,* 69 F. Supp. 389 (D.R.I. 1946), naturalization was revoked on the grounds of fraud and illegality, the court holding that a false statement in the proceeding that petitioner was married and a false statement in voting registration demonstrated the petitioner's lack of good moral character.

B. THE GOVERNMENT PROVED BY CLEAR, UNEQUIVOCAL AND CONVINCING EVIDENCE THAT APPELLANT CONCEALED AND WILFULLY MISREPRESENTED HIS MARITAL STATUS IN THE NATURALIZATION PROCEEDING.

1. The Wilfulness and Intent Required.

In arguing the matter of wilfulness and intent, appellant has apparently assumed that there must be intent to defraud in the sense of a consciously evil purpose of deception. Although in this case the evidence is clear that appellant had such a purpose, proof of such intent is not a requirement for revocation. The statute speaks only of "concealment of a material fact or willful misrepresentation." Clearly Congress intended the word "willful" to mean the intentional making of a statement which one knows to be false.

In none of the leading Supreme Court cases, *Schneiderman, Baumgartner* or *Knauer,* is there any mention of a requirement of intent to defraud or wilfulness in the sense of an evil purpose. In the *Baumgartner* case at 322 U.S. 672, and in the *Knauer* case at 328 U.S. 660, the Court speaks of perjurious falsity as distinguished from objective falsity. It is clear, however, that the Court is only concerned with whether the applicant was *aware* of the fact that his oath or statement was not true.

The crime of perjury itself only requires the giving of false testimony with knowledge of the falsity, although the statute may require that the statement be made "wilfully." In *Maragon v. United States,* 187 F.2d 79 (D.C. Cir. 1950), cert. denied, 341 U.S. 932, the court observed in upholding a perjury conviction

that the word wilful in the statute meant no more than "knowingly or intentionally."

In *Fields v. United States,* 164 F.2d 97 (D.C. Cir. 1947), involving wilful withholding of records, it was held that the act need not be done for an evil or bad purpose and that the term "wilful" was intended to rule out mere inadvertence or accident. Accord: *United States v. Illinois Central R. Co.,* 303 U.S. 239, 242 (1938); *United States v. Murdock,* 290 U.S. 389, 394 (1933); *Townsend v. United States,* 95 F.2d 352, 358 (D.C. Cir. 1938), cert. denied 303 U.S. 664.

2. The Weight to Be Given the Trial Court's Findings.

It is urged at page 8 of appellant's brief that an appellate court has a duty upon review of denaturalization cases to examine the evidence to ascertain whether it meets the high standard of proof required. But then appellant seems to suggest that this Court should try the case *de novo* on selected portions of the printed record in order to determine "whether the evidence presented by the Government is sufficient to justify the relief sought" (App.Op.Br. 8). It is clear, however, that the Supreme Court had no such procedure in mind when it evolved the "clear and convincing evidence" doctrine in *Schneiderman v. United States,* 320 U.S. 118, 125 (1943); *Baumgartner v. United States,* 322 U.S. 665, 670 (1944); and *Knauer v. United States,* 328 U.S. 654, 660 (1946). In the *Baumgartner* decision, at page 670, the Court said:

> "That the concurrent findings of two lower courts are persuasive proof in support of their

> judgments is a rule of wisdom in judicial administration. In reaffirming its importance we mean to pay more than lip service."

This statement is followed by a discussion of the duty of appellate review in light of the problem of "findings of fact" which are actually ultimate judgments on masses of evidentiary details or decisions which "cannot escape broadly social judgments." The Court carefully avoided enunciation of a fixed rule for the weight to be given lower courts' findings. The final conclusion was that it sufficed to say that the importance of the clear and convincing evidence test would be lost if the ascertainment by lower courts that the standard had been met were to be deemed a "fact" of the same order as all other "facts", not open to review.

In the *Knauer* case, 328 U.S. at page 660, the Court acknowledges that Rule 52(a) of the Federal Rules of Civil Procedure requires the reviewing court to give due regard to the appraisal of the veracity of the witnesses by the judge who saw and heard them.

The decisions in *Brenci v. United States,* 175 F.2d 90, 94 (1st Cir. 1949) and *Cufari v. United States,* 217 F.2d 404, 408 (1st Cir. 1954), cited at page 8 of appellant's brief, contain excellent analyses of this problem. In the *Brenci* case, the outcome turned almost entirely on the question of whether the appellant had acted knowingly and wilfully in concealing his arrests. Appellant's prior admissions indicated he had, but on the witness stand he denied any recollection of being

asked about the arrests, (a case very similar to the present appeal). In deciding whether credence should be given to the prior statement or to appellant's trial testimony, the Court of Appeals said, at page 94:

> ". . . a highly important factor in the decision of this question is the appellant's demeanor on the stand which the court below had an opportunity to observe, but we have not. Thus, it seems peculiarly appropriate for us to accept the view of the trial court that the statement is entitled to credence in spite of the appellant's apparent lack of facility on the stand.
>
> "And we do not read the decisions of the Supreme Court in recent denaturalization cases as necessarily precluding us from adopting the trial court's view as to the probative value of the statement."

The suggestion that appellate courts had been given the duty to try cases of this nature *de novo* on a cold record was expressly rejected. The Supreme Court decisions were interpreted as

> "requiring appellate courts to make their own findings of ultimate facts, at least in cases, unlike the one at bar, where a decision cannot 'escape broadly social judgments—judgments lying close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship.' *Baumgartner v. United States,* supra, 322 U.S. at page 671, 64 S.Ct. 1240, 88 L.Ed. 1525. But we do not interpret them as authorizing appellate courts to make independent findings of evidentiary facts of an objective nature when the credibility of a witness is an important factor in reaching a decision."

In the *Cufari* case the Court of Appeals again rejected the idea that they should wholly disregard findings of fact made below and themselves try these cases *de novo*. The court limited itself to a statement that while it would accord weight to a district court's findings in deference to the wisdom of the general rule of judicial administration based on the opportunity accorded that court to observe witnesses in the flesh and judge their credibility, it would not weight those findings as heavily as in other civil cases.

3. The Evidence and Findings of Wilfulness.

The evidence from which the trial court concluded that appellant had acted wilfully and with an intent to deceive the Government is summarized in the statement of facts herein. In attacking this evidence, appellant is able to point to nothing more than his own protestations of lack of intent to deceive (to which the trial court could give no credence), and the fact that he had later filed a petition for immigration visa which revealed his marriage to the Government (App. Op.Br. 12-13).

At page 19 of the brief the argument is made that appellant could not have wilfully concealed his marriage since, at a later time, he voluntarily submitted the petition showing that he had married in 1946. This, however, does not follow. In the first place, the petition for immigration visa was by no means a voluntary disclosure of the false statement, since the Immigration authorities discovered the fraud only by an item-by-item comparison of the petition filed in

1950 against the naturalization forms. Appellant may well have assumed that no one would discover the discrepancy, or he may have even forgotten the concealment of some years before. Or again, as in the case of *United States v. Mira,* 41 F. Supp. 224 (S.D. W.Va. 1941), he may have decided that it was worth the risk of denaturalization to bring his wife to this country. He may well have been erroneously advised that the misrepresentation would not be considered sufficiently material to warrant revocation.

Factually, this was not a complex case. It turned almost entirely on the question of whether or not appellant acted wilfully and intentionally when he made the false statements about the objective concrete fact of his marriage. In reviewing the evidence to determine whether it meets the required standard of proof, this Court should adopt the findings of the trial judge, who had the best, in fact the only fair opportunity to observe the demeanor of the witnesses and to judge their credibility. In his written opinion District Judge Murphy expressed his views of the evidence of wilfulness as follows:

> *"II—WILFUL MISREPRESENTATION*
>
> "This is primarily a factual question. It is enough to say that there is absolutely no doubt in my mind that Lumantes deliberately lied and intended to deceive the government when he falsely stated his marital status. His completely inconsistent explanations of the way the entry came to be on the form, his denial of the truth of his marriage when his wife sought entry, his deliberately equivocal and evasive answers when

testifying before me can lead to only one conclusion—he knew he was married and deliberately and wilfully misrepresented his marital status."

With such clear and convincing evidence of fraud before it, the court made the only finding of fact possible under the circumstances (finding of fact No. 6, R. 38-39), which recites:

"At the time of filing the preliminary forms for petition for naturalization, making the aforesaid oral statement, and filing the petition for naturalization, respondent was married, a marriage ceremony of marriage between respondent and Angela Munar having been performed on December 9, 1946 at Bauang, La Union, Republic of the Philippines, as respondent then and there well knew; and respondent concealed the fact that he was married and wilfully misrepresented his marital status with knowledge of the falsity and intent to deceive the Government."

III. CONCLUSION.

Appellant procured the order admitting him to citizenship and the certificate of naturalization by concealment of his marriage and by wilful misrepresentations of his marital status. The concealment of his marriage was material in that a disclosure of the facts relating to his marital status was a statutory requirement, his false statements closed off an avenue of inquiry into his eligibility for naturalization, and his false testimony under oath was itself proof of lack of good moral character. The evidence that

appellant had concealed his marriage and wilfully misrepresented his marital status, with knowledge of the falsity and with intent to deceive the Government, was more than clear, unequivocal and convincing—it was overwhelming. It left no room for doubt in the mind of the trial judge. The carefully considered judgment of the lower court should be affirmed.

Dated, San Francisco, California,
January 11, 1956.

Respectfully submitted,

LLOYD H. BURKE,
United States Attorney,

JAMES B. SCHNAKE,
Assistant United States Attorney,

Attorneys for Appellee.

(Appendix Follows.)

Appendix.

PETITIONER'S EXHIBIT NO. 4

REPUBLIC OF THE PHILIPPINES
PROVINCE OF LA UNION
BAUANG

OFFICE OF THE LOCAL CIVIL REGISTRAR

June 17, 1950

TO WHOM IT MAY CONCERN:

This is to certify that the undersigned, cannot issue the certified copy of the Marriage Contract of the spouses FIDEL VALDEZ AND ANGELA MUNAR, alleged to have been married in this municipality before the Justice of the Peace, on April 10, 1938, in view of the fact that the Register of Marriages during said year was burned in the former Stewart Building where the Municipal Treasurer's Office was located during the enemy occupation in this municipality.

This certificate is issued upon the request of Mrs. Angela M. de Lumantes, this 17th day of June, 1950, at Bauang, La Union, in connection with their application to go to the United States.

L. AQUINO
L. D. AQUINO

(Seal) Local Civil Registrar Clerk

PETITIONER'S EXHIBIT NO. 5

REPUBLIC OF THE PHILIPPINES
PROVINCE OF LA UNION
BAUANG
OFFICE OF THE LOCAL CIVIL REGISTRAR

The undersigned, Local Civil Registrar Clerk, hereby certifies that according to the Certificate of Death filed in this office, the following entries are shown:

Place of death	City of Baguio, Philippines
Name of deceased	Fidel Valdez
Residence	Paringao, Bauang, La Union
Sex	Male
Nationality	Filipino
Civil status	Married
Age	28 yrs.
Occupation	Laborer
Birthplace	Candon, Ilocos Sur
Name & Address of surviving spouse	Angela Munar, Bauang, La Union
Informant	(Sgd.) Angela Munar
Address	Bauang, La Union
Place of burial	Baguio, Mt. Prov.
Date of burial	March 21, 1945
Date of death	March 21, 1945
Cause of death	Killed instantly by bomb shellings.

This certificate is issued upon the request of Mrs. Angela M. de Lumantes, this 19th day of June, 1950, at Bauang, La Union, in connection with her application to go to the United States.

L. AQUINO
L. D. AQUINO
(Seal) Local Civil Registrar Clerk

PETITIONER'S EXHIBIT NO. 6

REPUBLIC OF THE PHILIPPINES
PROVINCE OF LA UNION
BAUANG
OFFICE OF THE LOCAL CIVIL REGISTRAR

This is to certify that according to the Marriage Contract under the custody of this office, the following entry is shown:

MARRIAGE CONTRACT

Municipality of Bauang, Province of La Union, Register No. 177

	Husband	Wife
Contracting parties	Amando S. Lumantes	Angela Munar
Age	30 yrs 9 mons.	25 yrs. 6 mons.
Nationality	Filipino	Filipino
Residence	San Fernando, La Union	Bauang, La Union
Single, widowed or divorce.	Single	Single
Father	Honorato Lumantes	Eugenio Munar
Nationality	Filipino	Filipino
Mother	Eusebia Jamorod	Tomasa Dumo
Nationality	Filipino	Filipino
Witnesses	Mariano P. Sobiano	Alejandra Navera
Residence	San Francisco, California	Bauang, La Union
Place of marriage	Iglesia de S. Pedro Apostol, Bauang, La Union	
Date of marriage	December 9, 1946	
Solemnized by	Rev. Fr. Arsenio Pacis	
Title	Parish Priest, Bauang, La Union	

This is to certify that I, Amando S. Lumantes, and I, Angela Munar on the date and at the place above given, of our own free will and accord and in the presence of the person solemnizing this marriage and of the above-named two witnesses, both of age, take each other as man and wife.

And I, Rev. Fr. Arsenio Pacis, Parish Priest, Certify that on the date and at the place above written, the aforesaid Amando S. Lumantes and Angela

Munar, were with their mutual consent lawfully joined together in matrimony by me in the presence of the above-named witnesses, both of age; and I further certify that the Marriage License No. 3322362, issued at Bauang, La Union, on Dec. 7, 1946, in favor of said parties, was exhibited to; and that consent to such marriage was duly given, as required by law, by the person or persons above mentioned.

IN WITNESS WHEREOF, we sign this certificate in triplicate this 9th day of December, 1946.

(SGD.) AMANDO S. LUMANTES
(SGD) ANGELA MUNAR
(SGD.) ARS. PACIS
Parish Priest

Witnesses:
(Sgd.) Mariano P. Sobiano
(Sgd.) Alejandra Navera

Received copy of marriage contract between Amando Lumantes and Angela Munar, such copy being signed or thumb-marked by the parties, the witnesses and the officiating priest, Rev. Arsenio Pacis. Dec. 9, 1946, (Sgd.) SINF. DUMO, Local Civil Registrar, Bauang, La Union.

This certificate is issued upon the request of Mrs. Angela M. de Lumantes, this 2nd day of August, 1949, at Bauang, La Union.

(Seal)

C. BALANON
Local Civil Registrar
& Municipal Treasurer
CJ/4

PETITIONER'S EXHIBIT NO. 7

U. S. DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
San Francisco 11, Calif.

File #1300/111905

Sworn statement taken from AMANDO SULIMENARIO LUMANTES, by Investigator G. L. Hash, in Rm. 1106-C, 630 Sansome St., San Francisco, Calif., on June 1st, 1951.

INVESTIGATOR HASH TO WITNESS:

Q. Mr. Lumantes. You are advised that I am an Investigator of the Immigration and Naturalization Service, Department of Justice. I am authorized by law to administer the oath in connection with the enforcement of the Immigration and Naturalization and Alien Registration laws. I desire to question you under oath concerning your petition for the issuance of an immigration visa for your wife, PETRONILA ANGELA MUNAR LUMANTES. Any statement you make should be voluntary and you are hereby warned that that may be used against you in any proceeding that the Government deems advisable. Are you willing to make such a statement?

A. I am glad, sir.

Q. Will you please stand and raise your right hand to be sworn. Do you solemnly swear that all of the statements you are about to make will be the

truth, the whole truth, and nothing but the truth, so help you, God?

A. Yes.

Q. You are informed that if you wilfully and knowingly give false testimony while under oath, during this proceeding, you may be prosecuted for perjury, the penalty for which is a fine of not more than $2,000. or imprisonment of not more than five years or both such fine and imprisonment. Do you understand?

A. Yes, sir.

Q. What is your full, true and correct name?

A. AMANDO SULIMENARIO LUMANTES.

Q. Your address?

A. 1204 Mason Street, San Francisco, Apt. 22.

Q. When and where were you born?

A. I was born on February 10, 1916 at Oroquieta, Misamis Occidental, Mindanao, Philippine Islands.

Q. When and where did you last enter the Uinted States?

A. In 1931, sir.

Q. Where?

A. San Francisco.

Q. Of what country are you a citizen?

A. American citizen through naturalization. (1)

Q. When and where were you naturalized?

A. I was naturalized in San Francisco, sir, in 1948.

Q. Are you the AMANDO SULIMENARIO LUMANTES of 1204 Mason Street, San Francisco who was admitted to citizenship, December 13, 1948?

A. That's right, sir.
(NOTE: File 245/P/89829 contains the subject's Petition for Naturalization and his photograph. The photograph is a good likeness, and the subject identifies it as being his own.)

Q. Are you married or single?

A. Married now, sir.

Q. When and where were you married?

A. I was married in Bauang La Union, Philippine Islands; December 10, 1946; to PATRICIA ANGELA MUNAR.

Q. Is that the person to whom your present petition applies named PETRONILA?

A. Yes, sir.

Q. Have you ever been married before?

A. No, sir.

Q. Had your wife ever been married before?

A. Yes, sir.

Q. How many times?

A. Once.

Q. How did her former marriage terminate?

A. Her husband was killed by the Japanese.

Q. When did you apply for naturalization?

A. If I won't be mistaken . . . I am not too sure . . . it was about 1945, somewhere around there.

Q. I show you Petition Form N-400 in the name of AMANDO S. LUMANTES, 1204 Mason Street, Apt. 7 (San Francisco), in which you claim to have resided at 1204 Mason Street in February, 1947 and which is date stamped by this Service, April 7, 1947. Is this your petition and is this your signature? (Shown).

A. Yes, sir, that is my signature.

Q. I show you Form N-405 which was sworn to before Preliminary Examiner C. A. Antonioli on October 14, 1948 which has your photograph stapled to it. Does this pertain to you? (Shown).

A. Yes, sir.

Q. Are you able to read and understand English?

A. That's right, sir. (2)

Q. On Form N-400, date stamped April 7, 1947, under Question (22) which reads: "How many times have you ever been married?", is typewritten, "I was never married." On the same form on the page designated, Statement of Facts to be Used in Making and Filing My Petition For Naturalization, under Question (7) is written in pen, "Not", in the space used to indicate whether or not married. On Form N-405, which was sworn to October 14, 1948, under Question (7) is indicated, "I am not married." Now, you have just stated to me that you were married December 10, 1946 to PATRICIA ANGELA MUNAR; and, in file no. 1300/111905, which is your petition file, I find a Marriage Contract issued on the request of Mrs. Angela M. de Lumantes, August 2, 1949, at Bauang, La Union, Philippine Islands, by Mr. C. Balanon, Local Civil Registrar & Municipal Treasurer of that town. Furthermore, I find in your petition Form I-133, page 2, Section 5, you state that you were married December 9, 1946; and under Section 6, same page, you state that the full name of your wife is PETRONILA ANGELA MUNAR

LUMANTES. Have you an explanation for these discrepancies?

A. There is no explanation, sir. But I was thinking I filed my petition in 1946 before I got married. I stated in my application for naturalization that I wasn't married because I am not too sure I applied for my naturalization application in 1946.

Q. Mr. Lumantes. You filled out and presented the application for naturalization after you were married.

A. Before, sir.

Q. The dates on the sworn documents in your naturalization file, both in 1948 and in 1947, were long after your marriage. They were prepared at different times and signed at different times. Both of them indicate in three separate places that you were not married.

A. That's right, sir.

Q. All this took place long after December, 1946 at which time you married your present wife. How can you now say that you were confused as to whether you were married or not?

A. That's what I was thinking. They send me a letter to appear at Immigration for examination for naturalization, and I was sent home because my ship was on the other side. I don't know how many times they send me letters before I get off the ship. I am not too sure that I filed my application before I got married, or not,—because they sent me a couple of letters that "You are to appear for Immigration". Because

if I was married before I apply for my application for naturalization, I am sure that I would have put it right that I was married.

Q. I show you Form 13-4 which is attached to your original Form N-400 and is a supplement thereto. In Form 13-4, you have indicated that you have resided at 1204 Mason Street "until now, February of 1947"?

A. That's right, sir.

Q. You have indicated that you were employed by the W. R. Chamberlin & Co. until March of 1947, which means that your petition was filed at or subsequent to that time. However, evidence which you yourself have submitted indicates that you were married December 9, 1946. Is it not true that you deliberately, and for reasons of your own, stated that you were not married? (3)

A. I could not say that I deliberately do it, because there is nothing wrong if we are married to tell the truth about it. If I filed the petition in 1947, I didn't do it deliberately.

Q. Let us take those occasions one at a time. On what date were you married?

A. December 9, 1946.

Q. Do you identify Form 13-4 attached to Form N-400, in which you stated that you were living in February, 1947 at 1204 Mason Street and that you were employed until March, 1947 by the W.R. Chamberlin & Co.? (Shown).

A. Yes, sir.

Q. Do you identify your signature on page no. 2 of N-400 in which you state under Question (18)

that you have been a resident of San Francisco, California "since November, 1936 until now, March, 1947"? (Shown).

A. Yes, sir.

Q. Do you read on this form under Question (22): "How many times have you ever been married?" typewritten, "I was never married." (Shown).

A. Yes.

Q. I show you Form N-405 which states on page no. 2, "Petitioner and above witnesses sworn by me on October 14, 1948, (signed) C. A. Antonioli"; which states on page no. 1 under Question (7) "I am not married" and on page no. 2 under Statement of Applicant, after the printed statement, "Marital history not shown in petition"—"None". Do you identify those as pertaining to you? (Shown).

A. That's right.

Q. Now Mr. Lumantes. As an intelligent man, you can realize that there are two possibilities. Either you were married to PETRONILA ANGELA MUNAR when you filed the petition and were naturalized, or you were not married at that time and the document which you later presented is a false document. Which is the case? There is the third possibility, that you may refuse to answer me since it is a voluntary statement.

A. No, I will answer it.

(Note: Fifteen minutes' pause) . . .

This is a false document. (Witness picking up and identifying document headed, "Republic of the Philippines, Province of La Union, Bauang".

This document was presented by the firm of attorneys, Jackson & Hertogs, in support of Form I-133, Petition For Issuance Of Immigration Visa.)

Q. Mr. Lumantes. Did you present this document to your attorneys, Jackson & Hertogs?

A. I guess it was sent by my wife.

Q. Did you present it to them?

A. I cannot say, because my wife sent everything to them.

Q. Remember, now, because we are going to have to ask them, also?

A. Yes, but I do not exactly remember whether I did or not. (4)

Q. I now present for your inspection Form I-133 (signed) Amando S. Lumantes and notarized before Notary Ruth Wilbur, September 1, 1950. Do you recognize your signature? (Shown).

A. Yes, sir.

Q. Did you present this document to this Service?

A. I guess I did, sir.

Q. Under your signature on page no. 3 of this form is printed, "Personally appeared before me, the above-named petitioner, who signed the foregoing petition in my presence and who, being fully sworn, on oath says that the facts stated in the foregoing petition are true as he verily believes." This statement is notarized and signed by Ruth Wilbur, Notary Public. Did you so swear, Mr. Lumantes?

A. I guess I did, sir.

Q. Now, either you did or you didn't.
A. I did.
Q. Have you ever in your life been married?
A. Yes, I am married now.
Q. When and where and to whom were you married?
A. PETRONILA MUNAR.
Q. Tell me the truth. Were you ever actually legally married?
A. Not exactly.
Q. In a marriage there can be no halfway; either married or not married. Which are you, married or not married?
A. Not married.
Q. Then what do you mean by "not exactly"?
A. I have not seen her for five or six years.
Q. Did you ever live with her as man and wife?
A. Yes, for ten days.
Q. When was that?
A. 1947 . . . something like that. I don't know what month, though.
Q. Where was it?
A. Somewhere in Bauang, La Union. I guess it was Barinjao.
Q. And you have not seen this woman since that time?
A. That's right.
Q. Have you ever lived with any other woman for any length of time?
A. No, sir . . . I wish to change the above statement. I have not seen PETRONILA since the ship was in Manila, which was on December 15, 1950.

Q. For how long a time did you see her then?
A. About two days, something like that. (5)
Q. Did you stay with her then as man and wife?
A. No, sir, because I was aboard the ship.
Q. When was it decided that you would present an application for an immigration visa in behalf of this woman?
A. About the time I presented the paper. (Witness indicates Form I-133 which was sworn to before a Notary Public, September 1, 1950).
Q. Had you been corresponding with PETRONILA prior to that time?
A. That's right, sir.
Q. Was it your intention to live with PETRONILA MUNAR as man and wife in the United States if she were able to immigrate here?
A. Yes, after we got married.
Q. Did you present this petition with the full knowledge of PETRONILA MUNAR?
A. Yes, sir.
Q. When did you first discuss this matter with her by letter?
A. When I was in the States. She answered my letters twice a month.
Q. When did you first start corresponding regularly with PETRONILA?
A. The late part of 1947.
Q. Did you discuss the matter of presentation of this petition when you were in Manila in December, 1950, with PETRONILA?
A. No, sir. The ship was in Manila and in 40 hours the ship leaves, and I was aboard the ship; and

the only time I got to see her was at her aunt's at nighttime and we didn't have time to discuss this. I had to stay aboard the ship because I couldn't leave my job.

Q. Why did PETRONILA provide you with this marriage document?

A. I don't know. She wants to come to the States.

Q. Were you advised by your attorneys that this document would have to be obtained?

A. That is what they say; before she could come to the States, we would have to have a document. That is right in the application.

Q. And you communicated that information to her by letter?

A. That's right, sir.

Q. How did she get a document which, in truth, should not exist?

A. I don't know, sir, because I wasn't there.

Q. Didn't she ever tell you how she obtained it?

A. No, sir.

Q. I gather from your statement that you and PETRONILA ANGELA MUNAR decided by yourselves that you would present the petition for the issuance of an immigration visa naming her as your wife in order for her to enter the United States as a nonquota immigrant when, in fact, she was not your wife and has not at this time been married to you legally. Is that correct?

A. That's correct. (6)

Q. Have your attorneys, Jackson & Hertogs, any intimation that such is the case?

A. I don't know, sir.

Q. Do they have any idea that you are not actually married?

A. That Certificate right there, that is all I could say . . . when they receive this Marriage Certificate right there.

Q. Did you ever advise them that you were not actually legally married?

A. No, sir.

Q. Then they have represented you in this matter in good faith?

A. I guess so.

Q. You guess so? Is there a doubt in your mind?

A. No, they didn't know about it.

Q. Are you aware that there is an immigration quota restricting the number of persons who may legally enter the United States from the Philippines?

A. No, sir, I didn't know that. In 1934 I heard that there was a limited number that may enter but I didn't know how many.

Q. Are you aware that wives of citizens of the United States are exempt from the quota restrictions?

A. That's right, sir.

Q. Is that, then, the reason you presented Petition For Issuance of Immigration Visa naming PETRONILA ANGELA MUNAR as your wife?

A. That's right.

Q. Are you aware that such an action is contrary to law?

A. What is that?

Q. I will explain it further. Do you know that it is contrary to law to present before the Government of the United States, a petition for the issuance of an immigration visa in behalf of a wife, in this case, PETRONILA ANGELA MUNAR, who actually is not your wife?

A. That's right . . . against the law.

Q. Have you always known that?

A. Yes, sir.

Q. Have you understood all my questions?

A. Yes, sir.

Q. Have you been given plenty of time to answer these questions?

A. Yes.

Q. Have you been placed under any duress or force?

A. No, sir.

Q. Have you been promised any special leniency or privilege by me for answering these questions?

A. No, sir. (7)

Q. Have you answered them all truthfully and to the best of your knowledge?

A. Yes, sir.

Q. Is there anything further you wish to say?

A. Nothing, sir.

Q. Will you sign the stenographer's notebook to indicate that you were present today?

A. I will, sir.

Q. When is the last time you entered the Uinted States?

A. Last Wednesday (May 30th) on the "President Pierce". My last foreign port was Yokohama. I sailed on that ship from San Francisco.

Q. Will you agree to keep this office advised as to your whereabouts and to come in to this office when called?

A. I will do so as far as is compatible with my occupation as a seaman.

Q. When do you expect to be back in port?

A. Sometime next week; I don't know what day.

Q. Will you came to this office next week and read over and sign this statement after it has been typed?

A. Yes, sir.

Amando S. Lumantes
(Signature, as traced from notebook no. 20482.)

I hereby certify that the foregoing is a true & correct transcript of my stenographic notes taken in the above hearing. Bk. 20482.
Caroline M. Miller
Stenographer

* * * * * * *

I, AMANDO SULIMENARIO LUMANTES, certify that pages 1 to 8, inclusive of statement made by me on June 1st, 1951, have been read by me, and that the answers herein given are true and correct to the best of my knowledge.

.....
(signature) (8)

PETITIONER'S EXHIBIT NO. 8

U. S. DEPARTMENT OF JUSTICE
Immigration & Naturalization Service
San Francisco 11, Calif.

File #1300/111905

Sworn statement taken from AMANDO SULIMENARIO LUMANTES by Investigator G. L. Hash, in Rm. 1106-C, 630 Sansome St., San Francisco, California, on June 4, 1951.

INVESTIGATOR HASH TO WITNESS:

Q. Why are you here today, Mr. Lumantes?
A. To redeem what I have said last Friday.
Q. Do you mean that the statement that you gave to me in this room last Friday is not correct?
A. It is not correct, sir.
Q. And you now wish to make a statement that you say will be correct?
A. That's right, sir.
Q. You understand that I am an Investigator of the Immigration and Naturalization Service, Department of Justice, authorized by law to administer the oath in connection with the enforcement of Immigration and Naturalization and Alien Registration laws. I desire to question you under oath concerning your petition for the issuance of an immigration visa to your wife, PETRONILA ANGELA MUNAR LUMANTES. Any statement you make should be voluntary and you are hereby warned that it may be used against you

in any proceeding the Government deems advisable. Are you willing to make such a statement?

A. I am, sir.

Q. Will you stand and take the oath. Do you solemnly swear that all of the statements you are about to make will be the truth, the whole truth, and nothing but the truth, so help you, God?

A. I will tell the truth.

Q. You are informed that if you wilfully and knowingly give false testimony while under oath, during this proceeding, you may be prosecuted for perjury, the penalty for which is a fine of not more than $2,000. or imprisonment of not more than five years or both such fine and imprisonment. Do you understand?

A. I understand, sir.

Q. What is your correct name and address?

A. AMANDO SULIMENARIO LUMANTES; 1204 Mason Street, Apt. 22, San Francisco, Calif.

Q. Are you the same person who gave a statement before me in this room on June 1st, 1951?

A. That is right; I am, sir.

Q. What part of that statement do you wish to retract?

A. To retract everything I said last Friday. (1)

Q. Do you mean that no one portion of that statement was true?

A. I want to revise everything; I want to start from the beginning and tell it correctly.

Q. Why, then, suppose you start from the beginning and in your own words tell me your story.

A. I will do it, sir. In July, 1946, I applied for my naturalization papers. And before I sail out, I handed it in to the room, I guess Room 1014, and then I sail out. I came back in February, 1947 from the Philippines on the same ship. I came over here to ask when do I have to take my examination. The lady down below told me that "your application was incomplete", because I don't give it to her the proof that I was in the States in 1931. So I went and get my record in high school, in Hayward Union High School, and gave my proof that I was here in 1931. And then, this is what I get for them; they give it to me; it was dated March 3, 1947; (displays school record). And that's where I handed it to the lady after I get it, in the afternoon, and then my ship moved out to Los Angeles a few days later. From then on, I sailed, March 21, 1947 from Los Angeles to Korea and I come back in Seattle, May 14, 1947. And that's all I know right there. And there is one more thing. To the best of my knowledge, I filled one blank while I handed in my proof that I was here in 1931; I filled one blank, the blank that says how long I have resided at Mason Street; some blank, some application, Mr. Hash. . . . I could not say what it is. That's all I could say right there.

Q. In what way does that change your status?

A. It changes the thing because it says right there in my application for naturalization that it was started April 8th (1947); that's what you said

last Friday. But I handed it to them in 1946, but it was not started in 1946 because it was incomplete, and I wasn't married before that when I handed in my application.

Q. You haven't stated in so many words on this occasion, but I gather that you are trying to indicate that you were married after you filled in the form and before you finally presented it to this Service. Is that right?

A. No, sir, I wasn't married when I gave my application to naturalization, to the lady down below. When I came back from the trip, it was incomplete because I didn't give them the proof that I was here in 1931.

Q. But you were married on that trip?

A. Yes, I was married on that trip.

Q. Then whatever possessed you to make that statement to me last Friday?

A. I was all mixed up. I could not tell you straight. The ship was in San Fernando 45 days; that is where I get married, it was so long there.

Q. That still doesn't explain why you told me deliberately and after much thought that the marriage document which you had presented was false?

A. Because I could not recall, Mr. Hash; that in my application for that naturalization I wasn't even married, I wasn't even married when I got my application right there; because I don't want to lose my citizenship papers. (2)

Q. Do I gather correctly, then, that you felt that admitting to presenting a false marriage docu-

ment was a lesser evil than admitting perjury during the presentation of your applications for naturalization?

A. Ask me that question in a simple way.

Q. Did you think it would be worse for you to admit that you lied when you applied for naturalization than to say that your Marriage Certificate was false?

A. Well, to tell you the truth, frankly speaking, I was afraid I might lose my naturalization paper.

Q. Who filled out your application for you?

A. I did, sir.

Q. Are you able to type?

A. I do, sir.

Q. You say that after first presenting your petition to the Immigration Service, Naturalization Division in 1946, you sailed on a ship touching at the Philippines, and while there married PETRONILA ANGELA MUNAR?

A. That's right, sir.

Q. That you returned to the United States and contacted the Naturalization Division in Room 1014 and that they advised you that your petition was not complete since you did not present proof that you had resided in the United States since 1931. Is that correct?

A. That's correct, sir.

Q. Did they return the petition to you?

A. No, sir.

Q. They did not return the petition to you?

A. No. They asked me to get the proof.

Q. Then, since you have first presented the petition, it has remained in the hands of the Immigration and Naturalization Service?

A. Yes, sir.

Q. Did you yourself fill out this form?

A. Yes, sir.

Q. Have you filled out all the forms you presented before the Immigration and Naturalization Service?

A. To the best of my knowledge I don't think so. I filled all in some of them. I missed one page, a separate page.

Q. Are you able to type?

A. Yes, sir.

Q. When you presented your evidence of residence in the United States in 1931, that is, a transcript of a high school record, did you at the same time present another petition for naturalization?

A. No, sir. To the best of my knowledge, I didn't. I don't think so, sir. (3)

Q. I now show you Form N-400 on which is typed under Record Found, on page 1, "Transcript of high school record shows petitioner entered Hayward Union High School at Hayward, California on August 17, 1931. Believe O.K. 10/14/48. (initials) C.A.A." Did you type this application? (Shown).

A. Yes, sir; but I didn't type this. (Witness points to the above-noted notation under Record Found.

Q. Did you type this entire form?

A. Yes, I typed this one out. I typed it all except the writing under Sections 24 and 26, which is initialed "C.A.A."

Q. You have now stated to me under oath that to the best of your knowledge and recollection, you prepared this form prior to departing from the United States in 1946?

A. That's right, sir.

Q. That you then departed from the United States and while in the Philippines married the woman you now call your wife?

A. That's right, sir.

Q. That subsequent to your return to the United States early in 1947, you found that you had not presented proof of residence in 1931 and obtained that proof from the Hayward Union High School and then presented it to the Immigration Service. Is that story the one you now claim to be correct?

A. That's right, sir.

Q. I find that this form (Form 13-4), which appears to have been typed on the same typewriter and which this Service shows was presented on April 7th of 1947, includes the information: "Resided in the city of San Francisco until now, February of 1947; and employed in the city of San Francisco by the W. R. Chamberlin & Co. from July, 1946 to March of 1947." And then in pen appears the notation: "From March, 1947 until now", indicating a later date than March, 1947. Also, on the reverse side of Form N-400 on page 2 under Question (18): "Q. In what places in the United States have you resided during the past five years?" is typed the answer, "San Francisco, California since November, 1936 until now,

March, 1947." That appears to me, Mr. Lumantes, as conclusive proof that you presented this petition subsequent to the time you state that you were legally married to PETRONILA ANGELA MUNAR. What is your statement now?

A. There is no statement I could make right now. I don't know why . . . I could not say why I put down I was never married, and I was still married.

Q. Did you at that time believe yourself to be separated from your wife?

A. I did consider her my wife because I supported her . . . I sent her some money.

Q. Form N-405, the form which contains the record of your examination by Mr. C. A. Antonioli, Preliminary Examiner, indicates that you were sworn before him on October 14, 1948 and at that time gave information including the statement, "Marital history not shown in petition—None"; and under Question (7) in the space designated whether or not married, the word, "Not". At that time you likewise stated "not married" before an Examiner of the Naturalization Department. Can you give any reason for that? (4)

A. That's right . . . he asked me that . . . are I married or not, and I said "No". I don't know why I said "No".

Q. Have you ever been in a hospital?

A. No, sir.

Q. Have you ever had any mental illnesses?

A. No, sir.

Q. Have you ever suffered lapses of memory?

A. No, sir.

Q. Then, do you now admit that you knowingly and wilfully made false statements on your petition for naturalization and on all the forms submitted in accordance with that?

A. I could not say I made a false statement on my application. I just said "No". I don't know why I said that.

Q. You will just remember telling me that you said "No" to the question asked you as to whether or not you were married, put to you by Examiner Antonioli. Do you now admit that that was a false answer?

A. I don't know why I said it. For my own reason, I don't know. I don't know why I said that because I was legally married.

Q. Do you believe that you would in any way gain consideration for your naturalization petition by stating that you were a single man?

A. I don't know whether a single man or a married man gets any consideration from the Immigration. I don't know.

Q. You mean, in naturalization?

A. In naturalization. I don't know.

Q. You do admit making the statement that you were not married?

A. Yes, I did; I made it.

Q. You don't know why you made it?

A. I don't know.

Q. You told me verbally earlier in the day that there was someone in this area who was present at your marriage. Do you know the name and address of this person?

A. I was trying to get the address over here because he was applying for naturalization, but he moved out. His name is MARIANO SABIANO. He formerly lived at 816 Franklin Street, Oakland. But he is not there now.
Q. He was naturalized when?
A. I don't think so; he apply for it.
Q. He applied for it when?
A. This year, sometime, I think. I tried to get his address but they wouldn't give it to me. (5)
Q. You say he was present at the time of your marriage?
A. Yes, sir. In fact, he was my interpreter because I could not speak their dialect.
Q. Was he a seaman, like you, at that time?
A. Yes, sir.
Q. What is the address of your wife right now?
A. Parinjao, Bauang, La Union (Philippine Islands).
Q. Is there a United States Consulate there?
A. No, sir; it is in Manila.
Q. How far is that from Manila?
A. I don't know how far. On the train, I leave 9 o'clock in the morning from San Fernando and arrive in Manila, 6 o'clock in the evening.
Q. How long are you going to be around here?
A. I have to go back to Los Angeles sometime tonight . . . 7 o'clock tonight, because my ship is there. From what the Captain told me, the ship would probably be moved from Los Angeles on Wednesday and then she is going to Stockton,

and from Stockton back to Frisco. They might change the order.

Q. When you return to town, will you look me up and read this statement and sign it?

A. I will do that, sir.

Q. (Written in English): Will you sign the stenographer's notebook to indicate that you were here today?

A. Yes.

A. S. Lumantes
(Signature, as traced from notebook #20482.)

I hereby certify that the foregoing is a true & correct transcript of my stenographic notes taken in the above hearing.

Caroline M. Miller, Steno.

* * * * * * *

I, AMANDO SULIMENARIO LUMANTES, hereby certify that pages 1 to 6, inclusive, of statement made by me on June 4, 1951, have been read by me and that the answers herein given are true and correct to the best of my knowledge.

A. S. Lumantes
(signature of witness) (6)

PETITIONER'S EXHIBIT NO. 10

UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service
San Francisco District 1300-111905

Sworn statement made by AMANDO SULIMENARIO LUMANTES on May 28, 1952 in Room 1106-C, Appraisers Building, San Francisco, California, before Investigator G. L. Hash, in the English language.

EXAMINING OFFICER TO WITNESS:

Q. You are advised that I am an Investigator and Acting Immigrant Inspector of the U. S. Department of Justice, Immigration and Naturalization Service, and authorized by law to administer oaths in connection with the enforcement of the Immigration and Naturalization and Alien Registration laws. I desire to question you, under oath, concerning your naturalization and the statements you made regarding your marriage at the time you were petitioning for naturalization. Any statements you make must be voluntary and may be used by the Government in any proceeding deemed proper. Are you willing to make such statements freely and voluntarily under oath at this time?

A. Yes, sir.

Q. Please stand and take the oath. Do you solemnly swear that the statements you make will be the truth, the whole truth, and nothing but the truth, So Help You God?

A. Yes, sir.
Q. What is your correct name?
A. Amando Sulimenario Lumantes.
Q. What is your address?
A. 1204 Mason. I get my mail there and return there when I am not at sea, however I have been sailing most of the time.
Q. You are advised that the Central Office of the Immigration and Naturalization Service desires to ascertain your true reason for making false statements regarding your marriage while filing for naturalization. This information must be obtained either through your testimony or further investigation. Are you willing to discuss those reasons at this time?
A. Sure, sir.
Q. Have you a clear idea in mind as to what it was that caused you to state that you were not married when you filed for naturalization?
A. I don't know exactly why I did say I was not married when I actually was married. My mind seems confused.
Q. How long did you live with your wife after you married her?
A. About two weeks.
Q. When did you next see her?
A. The last part of 1950, December. (1)
Q. At the time you applied for naturalization did you consider that you were a married man?
A. No. I found that I could not find a ship to go back to the Islands and I thought I would quit sailing all together once I had been naturalized.

Q. Did you ever state to anyone else that you were not married?

A. No. When I went to work for the Standard Oil Company on a tanker they asked me if I was married in regard to retirement and insurance, and I told them I was married and my wife lived in the Philippines. When I was on board a ship and was asked if I was married in regard to income tax dependents, I told them I was married and my wife was in the Philippines, and they told me I could not claim dependents unless they lived in the United States, Mexico, or Canada. It seemed to me that if my wife did not live in Canada, Mexico, or the United States and I had very little chance of ever getting her here, I should not claim her as a wife or dependent.

Q. Then had you sought advice as to whether you could bring your wife to the United States?

A. I asked various people and finally went to ask advice from Attorney Hertogs to see if I could bring my wife and her two children by another marriage to the United States. He told me that it might be possible if I were a citizen to bring my wife to the United States, but it was very unlikely that I would be able to bring her two children.

Q. Did you correspond with your wife very often after you married her?

A. Not so often—once in a while—every three or four months.

Q. Did you have any idea when you applied to be naturalized whether being married to a woman in the Philippines would in any way affect your naturalizations?

A. I had no thought on the matter at all.

Q. Whose idea was it that your wife should emigrate to the United States?

A. It was her idea. She wanted to come here.

Q. What is the status between you and your wife right now?

A. Since it seemed hopeless to bring her to the United States and I only see her for a few hours every four or five months, I told her the last time I saw her we might as well call it off and I would see a lawyer in the United States and get a divorce.

Q. Is there anyone in the United States who has been acquainted with you for a long period of time?

A. Yes, Marcellino Yougat, who lives at the same address, 1204 Mason Street.

Q. How long have you known him?

A. Since 1937.

Q. Where does he work now?

A. In the shipyards.

Q. Does he work days?

A. Yes, sir. (2)

Q. Do you know when his days off are?

A. Saturday and Sunday.

Q. Is there anyone else?

A. His brother, Lasor Yougat. He lives at the same place. He works somewhere in a hotel—I don't know where. I got my father too.

Q. Where is your father?

A. Somewhere in Richmond—I don't know exactly where.

Q. Will you please sign the stenographer's notebook to indicate your presence here today?

A. Will you read it back to me first?
NOTE: Complete statement is read back to witness by stenographer.

Q. You have had this testimony read back to you. Are there any changes you wish to make?

A. No.

Q. Will you now sign the stenographer's notebook as an indication of your presence?

A. (Complies).

A. S. Lumantes
(Signature traced)

May 29, 1952

I hereby certify that the foregoing is a true and correct transcript of testimony taken at the above-described hearing.
Pat Wynn
Pat Wynn, Stenographer, Book 20998 (3)

PETITIONER'S EXHIBIT NO. 11

DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

DIVISION

United States of America	No. Cr. 66–54
v.	Dist. Counsel
Amando S. Lumantes	1300–111905

On this 21st day of MAY, 1954 came the attorney for the government and the defendant appeared in person and waived Counsel at the time of the entry of plea.

It Is Adjudged that the defendant has been convicted upon his plea of guilty of the offenses of Conspiracy to Import, Transport and Conceal Narcotic Drug; Importing Narcotic Drug; Transportation and Concealment of Narcotic Drug. Title 21, USCA Sec. 174, as charged in the Information and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a

period of TWO YEARS and pay a fine of $1.00 on each of Counts 1, 2, and 3. Said terms of imprisonment to run concurrently.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Thomas F. Meaney,
United States District Judge.

(Certification by Clerk.)

No. 14,831

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION, a Corporation,

Appellee.

On Appeal From the Judgment of the United States District Court for the Southern District of California.

BRIEF FOR THE APPELLANT.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

CASES PAGE

STATUTES

MISCELLANEOUS

No. 14,831

IN THE

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UNITED STATES OF AMERICA,

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vs.

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Appellee.

On Appeal From the Judgment of the United States District Court for the Southern District of California.

BRIEF FOR THE APPELLANT.

Opinion Below.

The District Court's findings of fact and conclusions of law [R. 15-23] are not officially reported.

Jurisdiction.

This appeal involves federal transportation taxes. The taxes in dispute, in the amount of $817.55, were paid on November 30, 1950. Claim for refund was filed on March 19, 1951, and was rejected on July 31, 1951. [R. 18.] Within the time provided in Section 3772 of the Internal Revenue Code of 1939 and on June 13, 1952, the taxpayer brought an action in the District Court for

recovery of the taxes paid. [R. 3-6.] Jurisdiction was conferred on the District Court by 28 U. S. C., Section 1346. The judgment was entered on April 1, 1955. [R. 24-25.] Within sixty days and on April 22, 1955, a notice of appeal was filed. [R. 26-27.] Jurisdiction is conferred on this Court by 28 U. S. C., Section 1291.

Question Presented.

Where airplanes with pilots were furnished to carry taxpayer's employees from Burbank or places where they were located to other points to enable them to take motion pictures from the air or to select suitable locations for the production of motion pictures and return, whether such flights involve the transportation of persons within the meaning of Section 3469(a) of the Internal Revenue Code of 1939.

Statutes and Regulations Involved.

The pertinent statutory provisions, as well as provisions of the applicable Treasury Regulations 42, are set forth in Appendix A, *infra.*

Statement.

The relevant facts, as stipulated by the parties [R. 8-15], and as found by the District Court [R. 15-22], may be summarized as follows:

During the period October 1, 1946, to August 1, 1949, taxpayer employed Paul Mantz Air Services, hereinafter referred to as "Mantz," to furnish airplanes with pilots to enable taxpayer's employees to photograph from the air various scenes in the production of motion pictures and to enable them to discover or examine from the air locations on the ground suitable for the production of

motion pictures. When an airplane was used to photograph scenes from the air, the only person or persons in the airplane in addition to the pilot were taxpayer's cameramen engaged in such photography. When an airplane was used to discover or examine locations, the only persons in the airplane in addition to the pilot were taxpayer's employees who were directly concerned with the suitability of locations for the production of a particular motion picture, such as the producer, director, assistant director, production manager, art director and cameraman. [R. 16-17.]

The charges, as to which the transportation taxes in dispute were paid, involved flights by airplanes under the following circumstances:

(a) Taxpayer engaged Mantz in connection with a sequence in the motion picture entitled "Sand", relating to a search by air for a valuable horse following his escape from a railroad car after a train wreck. Mantz furnished a model L-1-E airplane and pilot. The pilot flew alone in the airplane from Burbank, California, to Durango, Colorado, the scene of the motion picture company on location. At Durango taxpayer's cameraman entered the airplane and thereafter he took pictures from the air of the surrounding ground terrain and also of the horse. The cameraman left the phane at Durango and the pilot returned alone in the airplane to Burbank. [R. 18-19.]

The flight by the pilot alone in the airplane from Burbank to Durango and return to Burbank took approximately 16 hours. The flying time consumed by the cameraman in aerial photography was approximately 7 hours and 35 minutes. Mantz charged the taxpayer $1,325 for this flight. The charge was on an hourly basis with-

out regard to whether any of taxpayer's employees were aboard the airplane. [R. 19.]

(b) In connection with taxpayer's production of the motion picture, "Chicken Every Sunday", Mantz furnished taxpayer the same model L-1-E airplane and a pilot to carry taxpayer's cameraman to enable him to photograph from the air pictures of airplanes on the ground. The pilot flew alone from Burbank to Carson City, Nevada, where the cameraman entered the airplane. The pilot returned alone in the airplane to Burbank. [R. 19-20.]

The total flying time was 10 hours and 35 minutes. Approximately 9 hours of the total elapsed time was consumed going to and returning from Carson City. Mantz charged taxpayer $750 for this flight. The charge was on an hourly basis without regard to whether any of taxpayer's employees were aboard the airplane. [R. 20.]

(c) In connection with taxpayer's production of the motion picture, "Twelve o'Clock High", Mantz furnished taxpayer a model B-25 airplane and pilot to carry taxpayer's cameraman to enable him to photograph from the air pictures of other airplanes in flight. Mantz charged taxpayer $3,100 for this flight. The charge was on an hourly basis without regard to whether any of taxpayer's employees were aboard the airplane. [R. 20.]

(d) In connection with taxpayer's production of the motion picture, "Willie Comes Marching Home", taxpayer desired to photograph a scene wherein an airplane would fly in one end of an airplane hangar, through the hangar, and out the other end. In order to find a hangar suitable for such purposes, Mantz furnished taxpayer a BT-13 airplane and pilot to carry taxpayer's cameraman. The

pilot and the cameraman examined from the air hangars at three different airfields and made practice approaches at one hangar to be sure there were no obstacles at either end of the hangar to such a flight. [R. 20-21.]

Mantz charged taxpayer $103.75 for this flight. This charge was based upon a total of 415 miles flown and at the rate of 25 cents per mile without regard to whether any of taxpayer's employees were aboard the airplane. [R. 21.]

(e) In connection with taxpayer's production of the motion picture, "Yellow Skies", Mantz furnished taxpayer with a Cessna aircraft and pilot to carry taxpayer's employees to enable them to examine from the air possible ground locations suitable for photographing the production of this picture. Taxpayer's employees aboard the airplane for this purpose were the picture's producer, director, art director and cameraman, all of whose duties were directly related to the discovery and examination of locations as a possible site in the production of this motion picture. [R. 21.]

Mantz charged taxpayer $75 for this flight. This charge was based upon an hourly rate and was without regard to whether any of taxpayer's employees were aboard the airplane. [R. 21.]

(f) In connection with taxpayer's production of the motion picture, "Captain From Castile", Mantz furnished taxpayer with a DC-3 aircraft and pilot to carry taxpayer's employees to enable them to examine from the air possible ground locations in Mexico suitable for photographing various scenes in the production of this picture. Taxpayer's employees aboard the plane were the producer, director, assistant director, production manager, art di-

rector and cameraman, all of whose duties were directly related to the discovery and examination of locations as possible sites in the picture's production. [R. 21-22.]

Mantz charged taxpayer $96 for this flight, which payment was without regard to whether any of taxpayer's employees were aboard the airplane. [R. 22.]

Mantz collected from taxpayer $817.55 in transportation taxes, as provided by Section 3469(a), for the above flights and paid this amount to the Collector of Internal Revenue for the Sixth California District. [R. 17-18.] Taxpayer subsequently filed with the Collector a claim for refund of the taxes paid by it to Mantz. [R. 18.] Following the Commissioner's rejection of its claim, taxpayer brought this action in the District Court below. [R. 3-6, 7-8, 18.]

The District Court concluded that none of the airplane flights described above involved the "transportation of persons" as that term is "generally understood in accordance with its ordinary meaning and common usage", and as that term is "used in Section 3469(a) of the Internal Revenue Code of 1939". [R. 22-23.] The Government has appealed to this Court from the judgment of the District Court below. [R. 24-27.]

Statement of Points to Be Urged.

On this appeal the Government urges and relies upon all of the points originally stated and set out by it [R. 30-31] as the points upon which it intends to rely. For present purposes, they may be briefly stated as follows: (1) The District Court erred in holding that the flights made herein did not involve the transportation of persons, as that term is generally understood in accordance with its ordinary meaning and usage; (2) the District

Court erred in holding that the flights made herein did not involve the transportation of persons as that term is used in Section 3469(a) of the Internal Revenue Code of 1939; (3) the District Court erred, in that the taxpayer herein did not sustain its burden of proof in the District Court; and (4) the District Court's findings of fact are not supported by the evidence, and the court's conclusion of law and judgment are not supported by the evidence and findings of fact.

Summary of Argument.

Taxpayer chartered airplanes from a common carrier, Mantz, in order to have its (taxpayer's) employees flown nonstop from Burbank, California, or other points, to places selected by taxpayer, and after taxpayer's employees had concluded their work in these areas, Mantz returned them to the same point from whence they were originally picked up.

The term "transportation" had already acquired a well developed meaning prior to the time Congress enacted in 1941 Section 3469 of the 1939 Code, and had been held by the Interstate Commerce Commission, the Civil Aeronautics Board and the courts to include circular nonstop trips similar to those made by Mantz in this case. It was held in those cases that, if the purpose of the trip was to see or reach a place, the carriage to such place constitutes transportation even though the passengers are not discharged at this point but are carried in a continuous journey back to their point of origin.

Therefore it would appear that, by employing in the Internal Revenue Code terminology similar to that previously employed in statutes governing transportation by motor vehicles and airplanes, Congress intended to subject

to the transportation tax the same movements which previously had been held to constitute transportation. This conclusion is supported by language included in the report of the Senate Committee on Finance where, in amending Section 3469 in 1951 to exempt from the transportation tax only amounts paid for fishing from boats, the committee pointed out that prior to the amendment such payments were taxable.

Furthermore it is clear that taxpayer's airplanes were chartered for transportation purposes, the payments were made solely for transportation services, and Mantz retained control over his airplanes and pilots so that the payments were not made for rental services.

Although Section 3469 does not require that the carrier be regularly engaged in the business of transporting persons for hire in order to have the carriage constitute transportation, nevertheless it is clear that Mantz is a common carrier regularly engaged in the business of transporting persons for hire, including persons from major motion picture studios in California is subject to the jurisdiction of the Civil Aeronautics Board, has filed and published tariffs listing his rates for transporting persons from Burbank, and the flights made in this case were made by him as part of his business of transporting persons by air. The fact that Mantz provided irregular and charter service would not affect his status as a common carrier.

Thus it is clear that the flights made in this case constitute transportation of persons in accordance with its long standing meaning and common usage, and as Congress employed that term in Section 3469 of the 1939 Code, and the District Court erred in holding otherwise.

ARGUMENT.

The District Court Erred in Failing to Hold That the Flights Made in This Case Constituted Transportation of Persons and That the Charges Made Therefor Are Taxable Under Section 3469(a) of the Internal Revenue Code of 1939.

The question presented on this appeal is whether the flights which took place herein involve the transportation of persons in accordance with Section 3469(a) of the Internal Revenue Code of 1939. (Appendix A, *infra.*) Taxpayer chartered airplanes from a common carrier in order to have its (taxpayer's) employees flown from Burbank, California, or from other points, to places selected by taxpayer and then returned to the points from whence they originally were picked up. The carrier, Mantz, was authorized by the Civil Aeronautics Board to provide irregular air transportation of the kind made herein; it held itself out to carry any person, including any photographer or other person from any studio in California, to various places in the United States; and it filed tariffs with the Civil Aeronautics Board setting forth rates for irregular air transportation. (See Appendix B, *infra.*[1]) Mantz' airplanes were chartered by taxpayer to carry its (taxpayer's) employees either from Burbank or other points to locations where taxpayer's motion pictures were being made to enable these employees to photograph or to observe from the air scenes of motion pictures, or to survey areas to select locations suitable for the production of motion pictures. After taxpayer's employees had con-

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[1]Appendix B, *infra,* is a certification by the Civil Aeronautics Board of Tariffs filed by Mantz with the Tariff Section, Bureau of Air Operations of that Board, and is an official and public document.

cluded their work in these areas Mantz carried them back to the same point from whence they originally were picked up.

The Government contends that these flights constitute "the transportation * * * of persons by * * * air, within or without the United States", as this term is "generally understood in accordance with its ordinary meaning and common usage" and as "used in Section 3469(a)" of the Internal Revenue Code of 1939, *infra,* and that the District Court erred in holding otherwise. [R. 22.]

Although neither the 1939 Code nor Treasury Regulations 42 define the term "transportation", nevertheless this term had already acquired a well developed meaning by the time Congress enacted Section 3469 in 1941 (Section 554(b) of the Revenue Act of 1941, c. 412, 55 Stat. 687). Consequently, it would appear that, by using terminology in the Internal Revenue Code similar to that previously employed in the statutes governing transportation by motor vehicles and airplanes, Congress intended to subject to the transportation tax the same movements which previously had been held to constitute transportation.

One of the contentions made to the District Court was that the movements in this case did not constitute transportation because taxpayer's employees were picked up and discharged at the same point. That this contention clearly lacks merit is readily apparent from comparing the movements which uniformly have been held for many years to constitute transportation under Part II of the Interstate Commerce Act (Motor Carrier Act, 1935, c. 498, 49 Stat. 543), and the Civil Aeronautics Act of 1938, c. 601, 52 Stat. 973, with the movements in this case.

For example, the jurisdiction of the Interstate Commerce Commission, under Sections 202(a) and 203(a) of the Motor Carrier Act (49 U. S. C., 1952 ed., Secs. 302-303) applies to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce. The Commission has uniformly ruled, and the courts have upheld the Commission, that sightseeing trips, which are similar to the trips made in this case, constitute transportation of passengers, although the trips commenced and ended at the same place with no pickup or discharge of passengers at any other point. See, *Fordham Bus Corp. v. United States,* 41 F. Supp. 712 (S. D. N. Y.). *Cf., Red Star Sightseeing Line, Inc., Com. Car. Application,* 1 M. C. C. 521; *Blue & Grey Sight Seeing Tours, Inc., Com. Car. Application,* 8 M. C. C. 124; *Inglis Common Carrier Application,* 31 M. C. C. 209, reversing 20 M. C. C. 42; *Cripps Common Carrier Application,* 24 M. C. C. 19; *Danforth Bus Lines Common Carrier Application,* 29 M. C. C. 423.

In concluding that transportation between places occurred when passengers were discharged at the same point where they were picked up, the Commission has repeatedly ruled that if the purpose of the trip is to see or to reach a place, the carriage to such place constitutes point to point transportation despite the fact that the passenger is engaged in a continuous journey to his point of origin.

The Civil Aeronautics Board has similarly ruled that circular flights, which originate and terminate at the same point in a state, nevertheless constitute interstate air transportation within the meaning of Section 1(10) and (21) of the Civil Aeronautics Act of 1938 (49 U. S. C., 1952 ed., Sec. 401) if the flight passes over another

state, although the flight need not land, discharge or pickup any passengers except at the point of origin of the flight. See, *Western A. E. Grandfather Certificates,* 1 C. A. A. 39, 42, where the Board ruled that 30-minute scenic flights which originated and terminated at West Yellowstone constituted air transportation, although of a type of "special service" referred to in Section 401(f) of the Act (49 U. S. C., 1952, ed., Sec. 481) for which no authorization was necessary.

In rejecting the contentions raised by carriers seeking to remain free from Board jurisdiction, whose contentions are similar to those raised by taxpayer in this case, the Board has pointed out that such contentions would enable a person to travel, in fact, over the entire United States, but, as a matter of law, be deemed not to have been transported from his point of origin to any other point, inasmuch as no break occurred in his journey and his ultimate destination was his point of origin. Such a contention, the Board has ruled, is contrary to the clear language of the statute, as well as to the intention of Congress in deciding which air movements should be subject to regulation as air transportation. See, *Canadian Colonial Airways, Montreal-Nassau Service,* 2 C. A. B. 752.

Thus it would appear that if a person goes aloft merely to experience the sensation of flight, this would not be transportation. But if the flight is undertaken to view a particular object or locality, or to direct from the air persons on the ground at that locality, then it would appear that such flights are undertaken primarily to reach that locality. Where a person accomplishes this purpose by means of a nonstop circular aerial flight, he has been transported between places to the same extent as if he had left the airplane for a time at the locality visited and

subsequently re-entered the airplane for the return trip. Since neither the Interstate Commerce Commission nor the Civil Aeronautics Board have considered that a stopover is necessary to have a trip considered as transportation, particularly where the purpose of the trip can be effected without such a stopover, it is reasonable to assume that Congress, in employing terminology in the 1939 Code similar to that which had already acquired a well defined meaning, intended the same types of movement to be taxable which previously had been held to constitute transportation of passengers or air transportation.

This conclusion is supported by language in the report of the Senate Committe on Finance (S. Rep. No. 781, 82d Cong., 1st Sess., p. 108 (1951-2 Cum. Bull. 458, 535)), wherein commenting on the amendment of Section 3469(a) by Section 493(a) of the Revenue Act of 1951, c. 521, 65 Stat. 452, to exempt from the transportation tax "amounts paid for transportation by boat for the purpose of fishing from such boat" the Committee made the following statement:

> Your committee's bill makes two changes in the 15-percent tax on amounts paid for the transportation of persons provided by sections 1650 and 3469 of the code. One of these exempts certain fishing trips from the tax on the transportation of persons. This provision is the same as that contained in the House bill. Under present law amounts paid for transportation in boats where the transportation takes place for the sole purpose of fishing from the boat have been held to be taxable under these sections.
> * * *

Consequently it is clear that Congress considered that Section 3469, as originally enacted, covered these nonstop

circular trips, and in limiting the exemption only to the charter of fishing boats, it is also clear that Congress did not intend to broaden the exemption by implication to include other transportation not specifically enumerated. *U. S. Trust Co. v. Helvering,* 307 U. S. 57, 60. The Treasury Regulations 42 (1942 ed.), Sec. 130.51 (Appendix A, *infra*), conforms to this intent of Congress when it states that continuous transportation beginning and ending at the same point is subject to the tax.

The decision of *Smith v. United States,* 110 F. Supp. 892 (N. D. Fla.), is not controlling in this case. In the first place the facts of the *Smith* case differ from those of the present case. In that case the persons boarding a fishing vessel were not concerned with being carried to a particular locality, in contrast to the situation in the present case. But, in any event, it is submitted that the *Smith* decision was erroneously decided, in that the court there relied solely upon cases involving Section 3475(a) of the 1939 Code (as added by Section 620(a), Revenue Act of 1942, c. 619, 56 Stat. 798), which imposes a tax upon the transportation of property "from one point in the United States to another", in contrast to Section 3469 which does not impose a point to point requirement for the transportation of persons, but applies the tax to all transportation. This difference between the two sections is significant, since there is no reason to transport property except to have it arrive at a designated point, whereas, as we have discussed above, a person may be transported even though he returns to his point of origin. In imposing a tax solely upon point to point transportation for property, as contrasted with taxing all transportation of persons, it appears clear that Congress recognized this

distinction.[2] Furthermore, although the *Smith* case involved taxable years prior to 1951, and the amendment contained in the Revenue Act of 1951 exempting fishing trips had already become effective prior to the time the court issued its decision, nevertheless that court failed to give any effect to the obvious intent of congress, as expressed by the Senate Committee on Finance, that such fishing trips were taxable prior to the amendment.[3]

There is not any merit to the contention, made below, that these amounts were not paid for transportation, but were paid for a special use of the airplane. Although, in some instances, an airplane could be chartered for uses other than transportation, as where a pilot was alone in an airplane and performed services other than transportation, such a situation did not occur in the present case where taxpayer's employees were present in the plane and photographed or observed scenes, and the pilot merely flew the airplane to localities selected by taxpayer. Furthermore, it is clear, in the present case, that Mantz retained sufficient control over his pilots and airplanes on these flights, to constitute them transportation services rather than airplane and pilot rental services. See, *United States v. La Tuff Transfer Service,* 95 F. Supp. 375 (Minn.); *Interstate Commerce Commission v. Werner,* 106 F. Supp. 497 (E. D. Ill.).

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[2]Consequently such opinions as *Getchell Mine v. United States,* 181 F. 2d 987, 990-991 (C. A. 9th); *Edward H. Ellis & Sons v. United States,* 187 F. 2d 698 (C. A. 3d); *Kearns v. United States,* 204 F. 2d 813 (C. A. 4th); are not relevant since these cases involve the transportation of property and not of persons.

[3]Since the 1951 amendment had become effective prior to the *Smith* decision, the question became moot and no appeal was warranted.

Moreover, taxpayer's contention before the District Court, that the legislative history of the enactment of Section 3469(a) shows that one of the main purposes in enacting a transportation tax was to discourage wartime travel, to make these facilities available for defense purposes, and to conserve the nation's stock of gasoline,[4] would apply with equal effect to flights made by an irregular carrier, since the tax would equally free space on planes of irregular carriers for Government shipments, would make these planes available for lease to the Government or would restrict their use to essential needs.

It was also contended before the District Court that Section 3469(a) requires a person to be carried on a regular passenger conveyance in order to have the carriage constitute transportation. Although Section 3475(a), relating to the transportation of property, applies the tax "only to amounts paid to a person engaged in the business of transporting property for hire", such a limitation has not been included in Section 3469. Furthermore such a contention is meaningless in this case, since Mantz is a common carrier regularly engaged in the business of transporting persons for hire. For example, in accordance with Section 401 of the Civil Aeronautics Act of 1938 (49 U. S. C., 1952 ed., Sec. 481), Mantz was required to apply for and to obtain a certificate from the Board in order to engage in air transportation[5] and, in accordance with Section 403 (49 U. S. C., 1952 ed., Sec. 483) Mantz filed with the Board and published tariffs

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[4]See, 94 Cong. Record, Part 3, pp. 3137-3139; 95 Cong. Record, Part 14, p. A3545, Part 15, p. 4929; 96 Cong. Record, Part 1, pp. 894 and 1378, Part 2, pp. 1533-1534, Part 14, p. A1475.

[5]But see, Section 416 of the Civil Aeronautics Act of 1938 (49 U. S. C. 1952 ed., Sec. 496).

listing his rates from Burbank to other places in the United States served by him. (Appendix B, *infra.*) Furthermore, any doubt that Mantz considered himself to be a common carrier is dispelled from reading his tariffs, wherein he holds himself out to transport the public generally. Thus it is clear that the flights made herein constituted a regular part of Mantz' business as an air carrier. Although Mantz provided only irregular service, and, in some instances, in accordance with paragraph (f) of Section 401, was permitted to make charter trips without regard to the points named in his certificate or at variance with his published tariff rates, as could any scheduled carrier, this would not affect his status as a common air carrier.[6] *Alaska Air Transport v. Alaska Airplane Charter Co.,* 72 F. Supp. 609 (Alaska); *Bowles v. Wieter,* 65 F. Supp. 359 (E. D. Ill.); *General Transp. Co. v. United States,* 65 F. Supp. 981 (Mass.); *Fordham Bus Corp. v. United States,* 41 F. Supp. 712 (S. D. N. Y.); *Flying Tiger Line v. Civil Aeronautics Board,* 204 F. 2d 404 (C. A. D. C.); *Pacific Nothern Airlines v. Alaska Airline,* 80 F. Supp. 592 (Alaska); *Smith v. O'Donnell,* 215 Cal. 714, 717-720, 12 P. 2d 933, 934-935.

Nor would the fact that in each instance taxpayer chartered an entire plane prevent Mantz from acting as a common carrier or the amounts from being paid for

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[6]That Mantz clearly held himself out to carry persons from other motion picture studios is shown by the fact that other cases, involving flights similar to those of the present case, are presently pending in the United States District Court for the Southern District of California. See, *Loew's, Inc. v. United States,* Civil No. 14244 PH; *Paramount Pictures Corp. v. United States,* Civil No. 14245 PH; *Samuel Goldwyn Productions, Inc. v. United States,* Civil No. 14246 PH; *Columbia Pictures Corp. v. United States,* Civil No. 14247 PH; *Warner Bros. Pictures, Inc. v. United States,* Civil No. 14248 PH.

transportation. Clearly Congress did not intend to exempt amounts paid to charter a conveyance merely because the payment was not specifically related to the number of persons carried, or because the carrier negotiated the hire of an entire vehicle or airplane for a particular journey rather than seek out individual patrons. See, Section 401(f) of the Civil Aeronautics Act of 1938, *supra,* and 14 Code of Federal Regulations (1952 ed.), c. 1, part 207, Charter Trips and Special Services, which define a charter trip as air transportation, and govern its operations. In carrying on the charter trips involved herein Mantz was subject to these provisions. See also, Treasury Regulation 42 (1942 ed.), Sec. 130.53 (Appendix A, *infra*) which hold that chartered conveyances are subject to the tax; *Fordham Bus Corp. v. United States, supra;* M. T. 31, 1948-2 Cum. Bull. 176, and *State ex rel. Anderson v. Witthaus,* 340 Mo. 1004, 102 S. W. 2d 99.

The tax normally is applied only to amounts paid to transport persons. Here the taxpayer has not shown that the charges made by Mantz covered anything other than the transporting of persons, *i.e.,* that they also covered deadheading, or that the rates charged were not based upon the length of time taxpayer's employees were transported. But even if the tax were paid for hours when the plane was deadheading, the taxpayer has failed to show any breakdown of the amount paid as between the transportation of persons and deadheading and, accordingly, it is not entitled to recover any portion of such tax. *Loew's, Inc. v. United States,* 99 F. Supp. 100 (S. D. Calif.). Moreover, since Mantz points out in his tariffs that the transportation tax was payable only when he carried persons (Appendix B, *infra,* C. A. B. Tariff No. 2, p. 7; C. A. B. No. 3, p. 11) it is reasonable to as-

sume that the tax paid in this case relates only to amounts paid while he carried taxpayer's employees.

Consequently it is clear that the flights involved in this case constitute the transportation of persons in accordance with that term's long standing meaning and common usage, and as Congress employed it in Section 3469(a) of the 1939 Code, and the District Court erred in holding otherwise.

Conclusion.

It is submitted that the judgment of the District Court is erroneous and should be reversed by this Court.

Respectfully submitted,

H. Brian Holland,
Assistant Attorney General.

Ellis N. Slack,

Robert N. Anderson,

Karl Schmeidler,
Attorneys,
Department of Justice.

Laughlin E. Waters,
United States Attorney.

Edward R. McHale,

Bruce I. Hochman,
Assistant United States Attorneys.

October, 1955.

APPENDIX A.

Internal Revenue Code of 1939:

SUBCHAPTER C—TRANSPORTATION OF PERSONS.

SEC. 3469. TAX ON TRANSPORTATION OF PERSONS, ETC.

(a) [As added by Sec. 554(b) of the Revenue Act of 1941, c. 412, 55 Stat. 687, and as amended by Sec. 609(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798.] *Transportation.*—There shall be imposed upon the amount paid within the United States, on or after October 10, 1941, for the transportation, on or after such effective date, of persons by rail, motor vehicle, water, or air, within or without the United States, a tax equal to 10 per centum of the amount so paid. Such tax shall apply to transporation by motor vehicles having a passenger seating capacity of less than ten adult passengers, including the driver, only when such vehicle is operated on an established line.

* * * * * * * * *

(26 U. S. C., 1946 ed., Sec. 3469.)

Treasury Regulations 42 (1942 ed.):

SEC. 130.51. *Scope of Tax.*—Section 3469(a) imposes a tax upon payments of more than 35 cents made in the United States on or after October 10, 1941, for transportation of persons, on or after such date, by rail, motor vehicle, water, or air.

* * * * * * * * *

The purpose of the transportation, whether business or pleasure, is immaterial.

It is not necessary that the transportation be between two definite points. If not otherwise exempt, a payment for continuous transportation beginning and ending at the same point is subject to the tax.

The tax accrues at the time payment is made for the transportation, irrespective of when the transportation is furnished.

The tax is payable by the person making the taxable transportation payment and is collectible by the person receiving such payment. * * *

* * * * * * * * *

SEC. 130.52. *Rate and Application of Tax.*—* * *

The tax is measured by the total amount paid, whether paid at one time or collected at intervals during the course of a continuous transportation, as in the case of a carrier operating under the zone system.

The tax is determined by the amount paid for transportation with respect to each person. Thus, where a single payment is made for the transportation of two or more persons, the taxability of the payment and the amount of the tax, if any, payable with respect thereto, must be determined on the basis of the portion of the total payment properly allocable to each person transported.

Where a payment covers charges for nontransportation services as well as for transportation of a person, such as charges for meals, hotel accommodations, etc., the charges for the nontransportation services may be excluded in computing the tax payable with respect to such payment, provided such charges are separable and are shown in the exact amounts thereof in the records pertaining to the transportation charge. If the charges for

nontransportation services are not separable from the charge of transportation of the person, the tax must be computed upon the full amount of the payment.

SEC. 130.53. *Payments for Transportation Subject to Tax.*—The following are examples of taxable payments for transportation * * *

* * * * * * * * *

(*i*) *Chartered conveyances.*—An amount paid in the United States for the charter of a special car, train, motor vehicle, aircraft, or boat for transportation purposes, provided no charge is made by the charterer to the persons transported, is subject to tax if the amount paid represents a per capita charge of more than 35 cents for each person actually transported.

The charterer of a conveyance who sells transportation to other persons must collect and accout for the tax with respect to all amounts paid to him for transportation which are in excess of 35 cents. In such case, no tax will be due on the amount paid for the chater of the conveyance, but it shall be the duty of the owner of the conveyance to advise the charterer of his liability for collecting and accounting for the tax.

* * * * * * * * *

SEC. 130.54. *Payments Not Subject to Tax.*—In addition to the payments specifically exempt from tax, as to which see sections 130.60 to 130.63, the following are examples of transportation payments not subject to tax:

* * * * * * * * *

(*h*) *Miscellaneous charges.*— * * *

* * * * * * * * *

APPENDIX A.

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It is not necessary that the transportation be between two definite points. If not otherwise exempt, a payment for continuous transportation beginning and ending at the same point is subject to the tax.

The tax accrues at the time payment is made for the transportation, irrespective of when the transportation is furnished.

The tax is payable by the person making the taxable transportation payment and is collectible by the person receiving such payment. * * *

* * * * * * * * *

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The tax is measured by the total amount paid, whether paid at one time or collected at intervals during the course of a continuous transportation, as in the case of a carrier operating under the zone system.

The tax is determined by the amount paid for transportation with respect to each person. Thus, where a single payment is made for the transportation of two or more persons, the taxability of the payment and the amount of the tax, if any, payable with respect thereto, must be determined on the basis of the portion of the total payment properly allocable to each person transported.

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SEC. 130.54. *Payments Not Subject to Tax.*—In addition to the payments specifically exempt from tax, as to which see sections 130.60 to 130.63, the following are examples of transportation payments not subject to tax:

* * * * * * * * *

(*h*) *Miscellaneous charges.*— * * *

* * * * * * * * *

(5) Charges in connection with the charter of a land, water, or air conveyance for the transportation of persons, such as for parking, icing, sanitation, "layover" or "waiting time", movement of equipment in deadhead service, dockage, wharfage, etc.

SEC. 130.59. *Charges Not Exceeding 35 Cents.*— * * *

* * * * * * * * *

An amount paid for the chater of a car, train, motor vehicle, aircraft, or boat is exempt from the tax, if the payment represent a per capita charge of 35 cents or less for each person actually transported.

* * * * * * * * *

APPENDIX B.

Civil Aeronautics Board

CERTIFICATION OF TRUE COPY

Washington, October 24, 1955

I Hereby Certify that the annexed and true copies of the original pages to Charter Tariff No. 2, C. A. B. No. 2, issued by Paul Mantz Air Service in effect from December 20, 1947 through September 11, 1948; and original and revised pages to Charter Tariff No. 2-A, C. A. B. No. 3, issued by A. Paul Mantz, d/b/a Paul Mantz Air Services effective on the dates shown, and still in effect, as set forth in Exhibit A attached hereto, on file in the Tariffs Section, Bureau of Air Operations.

B. R. GILLESPIE,
Chief, Tariffs Section.

Office of the Secretary of the Board

I Hereby Certify that B. R. Gillespie, who signed the foregoing certificate, is now, and was at the time of signing, Chief, Tariffs Section, Bureau of Air Operations, and that full faith and credit should be given his certificate as such.

In Witness Whereof, I have hereunto subscribed my name, and caused the seal of the Civil Aeronautics Board to be affixed this twenty-fifth day of October, one thousand nine hundred and fifty-five.

FRED A. TOOMBS,
Assistant Secretary,
Civil Aeronautics Board.

EXHIBIT A.

Charter Tariff No. 2, C. A. B. No. 2, issued by Paul Mantz Air Services in effect from December 20, 1947 through September 11, 1948.

Original Title Page and Original Pages 3, 4, 7, 8, 9, 10, 12, and 13.

Charter Tariff No. 2-A, C. A. B. No. 3, issued by A. Paul Mantz d/b/a Paul Mantz Air Services.

Original Title Page	Effective	September 12, 1948
1st Revised Title Page	"	November 30, 1949
Original Page 7	"	September 12, 1948
1st Revised Page 7	"	November 15, 1948
Original Page 9	"	September 12, 1948
1st Revised Page 9	"	July 30, 1954
Original Pages 10, 11 13, 14, 15 and 17	"	September 30, 1948

OFFICIAL FILE

C. A. B. No. 2
Cancels
C. A. B. No. 1
[Stamp]: Cancelled by C. A. B. No. 3
Effective 9-12, 1948

PAUL MANTZ AIR SERVICES

Charter Tariff No. 2

Covering Local Rules, Regulations, Charges, Exceptions, Area Directory

Airport to Airport Rates

Aircraft Mileage Rates

and

Charges

Applicable to

Passengers

Between All Points
of the
United States

This tariff is issued on one (1) day's notice under Special Tariff Permission of the Civil Aeronautics Board, C. A. B. No. 985.

Issued: December 10, 1947 Effective: December 20, 1947

Issued by
A. Paul Mantz
President
Lockheed Air Terminal
Burbank, California

OFFICIAL FILE

Original Page 3
C. A. B. No. 2

PAUL MANTZ AIR SERVICES
Interstate Passenger Tariff No. 2
Rules and Regulations

Rule 1— Application of Tariff

(A) The rates (the word "rates" include "fares" and "charges") in this tariff apply only on irregular air carrier rates of Paul Mantz Air Services between points which may be served by the Company.

(B) The provisions of this tariff, including provisions as to liability, shall become a part of the contract of carriage.

Rule 2—Application of Rates

(A) General

(1) Rates named herein apply only via the most direct airways from PMAS base of operations, Lockheed Air Terminal, Burbank, California, to destination and return and are computed on a round trip mileage basis. Where distances are not provided herein, they will be computed as indicated in this paragraph.

(2) Rates shown are in dollars and are payable in the lawful currency of the United States.

(3) Rates published herein apply between the airports used by PMAS and the cities named.

(4) Rates are based and charged on round trip mileage and are subject to the Federal Transportation Tax, so long as such tax is imposed by law.

(5) Rates for one way are the same as round trip with the exception that the Federal Transportation Tax is applicable on only that part of the flight in which passengers are actually carried.

(6) Rates given herein are for the entire aircraft. Separate or single seats are not sold.

(7) When possible, a 10% deposit of the charter rate is required to hold an aircraft for a specific flight, with the balance due and payable prior to departure.

For explanation of abbreviations and other symbols, see

Page 1.

Issued: December 10, 1947 Effective: December 20, 1947

Issued By
A. Paul Mantz
President

Lockheed Air Terminal
Burbank, California

Original Page 4
C. A. B. No. 2

PAUL MANTZ AIR SERVICES

Interstate Pasenger Tariff No. 2

Rules and Regulations (Cont'd.)

Rule 3—Liability

(A) The rules and regulations set forth in this tariff apply only to air transportation furnished by PMAS.

Rule 4—Refusal or Cancellation of Flights

(A) PMAS may cancel any reservation or refuse to carry any person when such action is necessary, in its opinion, to comply with applicable governmental regulations or is, in its opinion, necessary because of weather conditions, or is occasioned by reasons beyond its control.

(B) PMAS reserves the right to remove at any point or to refuse to transport any passenger whose status, age or mental or physical condition is such, in its opinion, to:

(1) Render him incapable of caring for himself without assistance, unless accompanied by an attendant who will be responsible for caring for the incapacitated person enroute, and then only if with the care of such attendant, the incapacitated person will require no more attention or assistance from the employees of PMAS than is required for ordinary, able-bodies passengers; or

(2) Cause discomfort or make him objectionable to other pasengers; or

(3) Involve more than normal hazard or risk to himself or to other persons or property.

(C) No passenger whose status, age or mental or physical condition is such as to involve more than normal hazard or risk to himself will be accepted for transportation except upon the express condition that PMAS will not be liable for any injury, illness or disability (or any aggravation as consequence thereof, including death) caused by such status, age, mental or physical condition.

(D) If a flight is cancelled by PMAS, the 10% deposit will be refunded to the customer.

(E) If a flight is cancelled by the customer without reasonable notice, the 10% deposit will be retained by PMAS.

For explanation of abbreviations and other symbols, see Page 1.

Issued: December 10, 1947 Effective: December 20, 1947

Issued by
A. Paul Mantz
President

Lockheed Air Terminal
Burbank, California

Original Page 7
C. A. B. No. 2

PAUL MANTZ AIR SERVICES

Interstate Passenger Tariff No. 2

Airplane Mileage Rates

The aircraft of this company may be chartered at the following rates:

Aircraft	Pass. Seats	Rate Per Mi.
Douglas DC3	21	$00.85
Gruman Goose	6	$00.85
Lockheed 12	7	$00.50
Cessna	4	$00.30
Spartan Executive	4	$00.30
Vultee BT13	2	$00.25
Vultee BT13	1	$00.25

Layover Charges

Layover charges are flexible and adjusted in accordance with the number of miles of the flight.

Douglas DC3	$100.00 per day
Gruman Goose	100.00 " "
Lockheed 12	50.00 " "
Cessna	25.00 " "
Spartan Executive	25.00 " "
Vultee BT13's	25.00 " "

Federal Transportation Tax

Charter rates are subject to Federal Transportation Tax for any part of the flight where passengers are carried, so long as such tax is imposed by law.

Crew Charges

On all over night or longer flights, the person chartering the airplane will pay for the crew's meals and lodging at either the rate of $10.00 per day per person or actual expenses, at the option of the customer.

For explanation of abbreviations and other symbols, see Page 1.

Issued: December 10, 1947 Effective: December 20, 1947

Issued By
A. Paul Mantz
President
Lockheed Air Terminal
Burbank, California

Original Page 8
C. A. B. No. 2

PAUL MANTZ AIR SERVICES
Interstate Passenger Tariff No. 2

Contract Charter

This company reserves the right to bid on air transportation and contract for the use of its aircraft on a Contract Carrier basis with Government Agencies, State Agencies, U. S. Government Territorial Agencies and Departments, Military Services, Commercial firms, Construction Companies, Universities, Schools, Institutions or other persons, firms or organizations within the continental limits of the United States, its territories and possessions, the Dominion of Canada, Mexico, Central America, Alaska and countries and dominions within the scope of the Western Hemisphere.

For explanation of abbreviations and other symbols, see Page 1.

Issued: December 10, 1947 Effective: December 20, 1947

Issued By
A. Paul Mantz
President
Lockheed Air Terminal
Burbank, California

ORIGINAL PAGE 9
C.A.B. No. 2

Paul Mantz Air Services

Interstate Passenger Tariff No. 2

Rates between Burbank, Calif. and following points in California:

CALIFORNIA	1 WAY MI.	DC 3 GRMN	LCKD	CSNA SPTN	BT13
Arcata	580	$986.00	$580.00	$348.00	$290.00
Bakersfield	100	170.00	100.00	60.00	50.00
Banning	100	170.00	100.00	60.00	50.00
Barstow	110	187.00	110.00	66.00	55.00
Bishop	250	425.00	250.00	150.00	125.00
Blythe	200	340.00	200.00	120.00	100.00
Calexico	210	357.00	210.00	126.00	105.00
*Catalina Island	* 50	100.00	70.00	50.00	
Crescent City	650	1105.00	650.00	390.00	325.00
Chico	450	765.00	450.00	270.00	225.00
Death Valley	200	340.00	200.00	120.00	100.00
Del Mar	110	187.00	110.00	66.00	55.00
Dunsmuir	550	935.00	550.00	330.00	275.00
El Centro	200	340.00	200.00	120.00	100.00
Eureka	570	969.00	570.00	342.00	285.00
Fresno	200	340.00	200.00	120.00	100.00
Hemet	90	153.00	90.00	54.00	45.00
Hobergs	430	731.00	430.00	258.00	215.00
Hollister	260	442.00	260.00	156.00	130.00
Indio	120	204.00	120.00	72.00	60.00
Inyokern	150	255.00	150.00	90.00	75.00
King City	210	357.00	210.00	126.00	105.00
La Quinta	120	204.00	120.00	72.00	60.00
Lake Tahoe	400	680.00	400.00	240.00	200.00
Manzanar	175	297.50	175.00	105.00	87.50
Marysville	400	680.00	400.00	240.00	200.00
Merced	280	476.00	280.00	168.00	140.00
Modesto	290	493.00	290.00	174.00	145.00
Monterey	250	425.00	250.00	150.00	125.00
Montague	575	977.50	575.00	345.00	287.50
Mt. Shasta	560	952.00	560.00	336.00	280.00
Needles	220	374.00	220.00	132.00	110.00
Oakland	350	595.00	350.00	210.00	175.00
Oceanside	90	153.00	90.00	54.00	45.00
Palmdale	60	102.00	60.00	36.00	30.00

*Catalina Island is an exception to our standard rate as it is an over water flight and special equipment is required. The following higher rate is charges: DC3 and Grmn, $1.00 per mi.; Lckd, .70¢ per mi.; Csna, .50¢ per mi.

All fares are subject to Federal Transportation Tax
For explanation of abbreviations and other symbols, see Page 1
ISSUED: DECEMBER 10, 1947 EFFECTIVE: DECEMBER 20, 1947

Issued By
A. Paul Mantz
President

Lockheed Air Terminal
Burbank, California

ORIGINAL PAGE 10
C.A.B. No. 2

Paul Mantz Air Services

Interstate Passenger Tariff No. 2

Rates between Burbank, Calif. and following points in California:

CALIFORNIA (Cont'd)	1 WAY MI.	DC 3 GRMN	LCKD	CSNA SPTN	BT13
Palm Springs	110	$187.00	$110.00	$ 66.00	$ 55.00
Paso Robles	175	297.50	175.00	105.00	87.50
Porterville	150	255.00	150.00	90.00	75.00
Red Bluff	500	850.00	500.00	300.00	250.00
Redding	525	892.50	525.00	315.00	262.50
Riverside	65	110.50	65.00	39.00	32.50
Sacramento	375	637.50	375.00	225.00	187.50
San Bernardino	70	119.00	70.00	42.00	35.00
San Diego	125	212.50	125.00	75.00	62.50
San Francisco	350	595.00	350.00	210.00	175.00
San Jose	325	552.50	325.00	195.00	162.50
San Luis Obispo	160	272.00	160.00	96.00	80.00
San Simeon	185	314.50	185.00	111.00	92.50
Santa Barbara	100	170.00	100.00	60.00	50.00
Santa Cruz	310	527.00	310.00	186.00	155.00
Santa Maria	140	238.00	140.00	84.00	70.00
Santa Rosa	400	680.00	400.00	240.00	200.00
Sonora	300	510.00	300.00	180.00	150.00
Stockton	320	544.00	320.00	192.00	160.00
Tehachapi	80	136.00	80.00	48.00	40.00
Twenty-Nine Palms	140	238.00	140.00	84.00	70.00
Ukiah	450	765.00	450.00	270.00	225.00
Ventura	60	102.00	60.00	36.00	30.00

All fares are subject to Federal Transportation Tax

For explanation of abbreviations and other symbols, see Page 1

ISSUED: DECEMBER 10, 1947 EFFECTIVE: DECEMBER 20, 1947

Issued By
A. Paul Mantz
President

Lockheed Air Terminal
Burbank, California

ORIGINAL PAGE 12
C.A.B. No. 2

PAUL MANTZ AIR SERVICES

Interstate Passenger Tariff No. 2

Rates between Burbank, California and points in following states:

UTAH	1 WAY MI.	DC 3 GRMN	LCKD	CSNA SPTN	BT13
Blanding	550	$935.00	$550.00	$330.00	$275.00
Bryce Canyon	440	748.00	440.00	264.00	220.00
Cedar City	380	646.00	380.00	228.00	160.00
Gunnison	510	867.00	510.00	306.00	255.00
Kanab	390	663.00	390.00	234.00	195.00
Logan	660	1122.00	660.00	396.00	330.00
Milford	430	731.00	430.00	258.00	215.00
Ogden	640	1088.00	640.00	384.00	320.00
Provo	580	986.00	580.00	348.00	290.00
Salt Lake City	600	1020.00	600.00	360.00	300.00
Salina	500	850.00	500.00	300.00	250.00
St. George	340	578.00	340.00	204.00	170.00
Vernal	650	1105.00	650.00	390.00	325.00
ARIZONA					
Ashfork	340	578.00	340.00	204.00	170.00
Bisbee	530	901.00	530.00	318.00	265.00
Douglas	550	935.00	550.00	330.00	275.00
Flagstaff	390	663.00	390.00	234.00	195.00
Fredonia	385	654.50	385.00	231.00	192.50
Globe	450	765.00	450.00	270.00	225.00
Grand Canyon	380	646.00	380.00	228.00	190.00
Holbrook	460	782.00	460.00	276.00	230.00
Jerome	350	595.00	350.00	210.00	175.00
Kaibab	380	646.00	380.00	228.00	190.00
Kingman	250	425.00	250.00	150.00	125.00
Nogales	490	833.00	490.00	294.00	245.00
Phoenix	375	637.50	375.00	225.00	187.50
Prescott	340	578.00	340.00	204.00	170.00
Safford	510	867.00	510.00	306.00	255.00
St. Johns	510	867.00	510.00	306.00	255.00
Tucson	460	782.00	460.00	276.00	230.00
Winslow	450	765.00	450.00	270.00	225.00
Yuma	250	425.00	250.00	150.00	125.00

All fares are subject to Federal Transportation Tax
For explanation of abbreviations and other symbols, see Page 1
ISSUED: DECEMBER 10, 1947 EFFECTIVE: DECEMBER 20, 1947

Issued By
A. Paul Mantz
President

Lockheed Air Terminal
Burbank, California

ORIGINAL PAGE 13
C.A.B. No. 2

Paul Mantz Air Services

Interstate Passenger Tariff No. 2

Rates between Burbank, California and points in following states:

	1 WAY	DC 3		CSNA	
MONTANA	MI.	GRMN	LCKD	SPTN	BT13
Billings	980	$1666.00	$980.00	$588.00	$490.00
Boseman	900	1530.00	900.00	540.00	450.00
Butte	900	1530.00	900.00	540.00	450.00
Dillon	850	1445.00	850.00	510.00	425.00
Great Falls	1020	1734.00	1020.00	612.00	510.00
Helena	950	1615.00	950.00	570.00	475.00
Lewiston	1020	1734.00	1020.00	612.00	510.00
Miles City	990	1683.00	990.00	594.00	495.00
Missoula	930	1581.00	930.00	558.00	465.00
WYOMING					
Casper	900	1530.00	900.00	540.00	450.00
Cheyenne	890	1513.00	890.00	534.00	445.00
Jackson Hole	800	1360.00	800.00	480.00	400.00
Laramie	860	1462.00	860.00	516.00	430.00
Rawlins	820	1394.00	820.00	492.00	410.00
Rock Springs	720	1224.00	720.00	432.00	360.00
Sheridan	970	1649.00	970.00	582.00	485.00
Yellow Stone	850	1445.00	850.00	510.00	425.00
COLORADO					
Colorado Springs	820	1394.00	820.00	492.00	410.00
Delta	650	1105.00	650.00	390.00	325.00
Denver	850	1445.00	850.00	510.00	425.00
Grand Junction	650	1105.00	650.00	390.00	325.00
La Junta	865	1470.50	865.00	519.00	432.50
Pueblo	830	1411.00	830.00	498.00	415.00
Trinidad	800	1360.00	800.00	480.00	400.00
Springfield	910	1547.00	910.00	546.00	455.00
NEW MEXICO					
Albuquerque	700	1190.00	700.00	420.00	350.00
Carlsbad	850	1445.00	850.00	510.00	425.00
Clovis	900	1530.00	900.00	540.00	450.00
Demming	640	1088.00	640.00	384.00	320.00
Gallup	560	952.00	560.00	336.00	280.00
Hobbs	900	1530.00	900.00	540.00	450.00
Las Cruces	690	1173.00	690.00	414.00	345.00
Las Vegas	750	1275.00	750.00	450.00	375.00

All fares are subject to Federal Transportation Tax

For explanation of abbreviations and other symbols, see Page 1

ISSUED: DECEMBER 10, 1947 EFFECTIVE: DECEMBER 20, 1947

Issued By
A. Paul Mantz
President

Lockheed Air Terminal
Burbank, California

(No Supplement to this Tariff will be issued except for the purpose of cancelling the Tariff, unless otherwise specifically authorized by the C.A.B.)

(1) C. A. B. No. 3
Cancels
C. A. B. No. 2
Original Title Page

[Stamp]: Cancelled by 1st Revised Page title Effective 11-30-49

A. Paul Mantz
doing business as
PAUL MANTZ AIR SERVICES

Charter Tariff No. 2-A

Cancels
Charter Tariff No. 2

Naming
Airport to Airport Rates and Charges
And
Rules and Regulations Governing Same
For
The Transportation of Persons and Property
Between
Lockheed Air Terminal, Burbank, California
And
All Points in the United States
as Specifically Provided Herein.

(1) Tariff matter formerly appearing in Tariff C. A. B. No. 2, not reproduced herein
△ cancelled.

△ Change; neither increase nor reduction.

Issued August 4, 1948 Effective September 12, 1948

Issued by: A. Paul Mantz, Owner,
Lockheed Air Terminal
Burbank, California.

(No Supplement to this Tariff will be issued except for the purpose of cancelling the Tariff, unless otherwise specifically authorized by the C.A.B.)

C. A. B. No. 3
Cancels
C. A. B. No. 2
First Revised Title Page
Cancels
Original Title Page

A. Paul Mantz
doing business as
PAUL MANTZ AIR SERVICES

Charter Tariff No. 2-A
Cancels
Charter Tariff No. 2
Naming
Airport to Airport Rates and Charges
And
Rules and Regulations Governing Same
For
The Transportation of Persons and Property
Between
Lockheed Air Terminal, Burbank, California
And
All Points in the United States
Also
[] Agua Caliente, Mexico
as Specifically Provided Herein.

[] Addition
Issued October 24, 1949
Changes on this Page Effective November 30, 1949
Original Title Page Effective September 12, 1948

Issued by: A. Paul Mantz, Owner
Lockheed Air Terminal
Burbank, California

Correction No. 4

C. A. B. No. 3
Original Page 7

A. Paul Mantz, d.b.a.,
PAUL MANTZ AIR SERVICES

Charter Tariff No. 2-A

Rule No. Section 1 Rules and Regulations

Application of Tariff

△ (a) The rates, fares and charges, including the rules and regulations governing same, in this
* tariff, apply for the transportation of persons and property by aircraft, from, to and between points
5 authorized to be served by A. Paul Mantz, d.b.a., Paul Mantz Air Services, as an "irregular Air Carrier".

(b) The provisions of this tariff, including provisions as to liability, shall become a part of the contract of carriage.

Application of Rates—General

(a) Rates named herein apply only via the most direct airways from PMAS base of operations, Lockheed Air Terminal, Burbank, California, to destination and return and are computed on a round trip mileage basis. Where distances are not provided herein, they will be computed as indicated in this paragraph.

△ (b) Rates shown are in dollars and cents and are payable in the lawful currency of the United States.

* △ (c) Rates as provided herein apply between the airports used by PMAS at the cities named and

10 do not include ground transportation between airport and city named.

(d) Rates are based and charged on round trip mileage and are subject to the Federal Transportation Tax, so long as such tax is imposed by law.

(e) Rates for one way are the same as round trip with the exception that the Federal Transportation Tax is applicable on only that part of the flight in which pasengers or property are actually carried.

△ (f) Rates named herein are for the entire aircraft. Separate or single seats or portions of aircraft space are not sold.

(g) When possible, a 10% deposit of the charter rate is required to hold an aircraft for a specific flight, with the balance due and payable prior to departure.

See Page 4 for explanation of abbreviations and reference marks.

[Stamp]: Cancelled by 1st Revised Page 7 Effective 11-15-48

Issued August 4, 1948 Effective September 12, 1948

Issued by: A. Paul Mantz, Owner,
Lockheed Air Terminal
Burbank, California.

C. A. B. No. 3
1st Revised Page 7
Cancels
Original Page 7

A. Paul Mantz, d.b.a.,
PAUL MANTZ AIR SERVICES
Charter Tariff No. 2-A

Rule No. Section 1 Rules and Regulations

Application of Tariff

(a) The rates, fares and charges, including the rules and regulations governing same, in this tariff, apply for the transportation of persons and property by aircraft, from, to and between points authorized to be served by A. Paul Mantz, d.b.a., Paul Mantz Air Services, as an "Irregular Air Carrier".

(b) The provisions of this tariff, including provisions as to liability, shall become a part of the contract of carriage.

Application of Rates—General

(a) Rates named herein apply only via the most direct airways from PMAS base of operations, Lockheed Air Terminal, Burbank, California, to destination and return and are computed on a round trip mileage basis. Where distances are not provided herein, they will be computed as indicated in this paragraph.

(b) Rates shown are in dollars and cents and are payable in the lawful currency of the United States.

(c) Rates as provided herein apply between the airports used by PMAS at the cities named and do not include ground transportation between airport and city named.

(d) Rates are based and charged on round trip mileage and are subject to the Federal Transporation Tax, so long as such tax is imposed by law.

(e) Rates for one way are the same as round trip with the exception that the Federal Transportation Tax is applicable on only that part of the flight in which passengers or property are actually carried.

(f) Rates named herein are for the entire aircraft. Separate or single seats or portions of aircraft space are not sold.

◈ (g) A 10% deposit of the charter rate is required to hold an aircraft for a specific flight, with the balance due and payable prior to departure.

See Page 4 for explanation of abbreviations and reference marks.

Issued October 7, 1948 Effective November 15, 1948

Issued by: A. Paul Mantz, Owner,
Lockheed Air Terminal
Burbank, California.

Correction No. 2

C. A. B. No. 3
Original Page 9

A. Paul Mantz, d.b.a.,
Paul Mantz Air Services

Charter Tariff No. 2-A

Rule No. Section 1 Rules and Regulations—Continued

Cancelled and Delayed Flights

(a) PMAS may cancel any flight at point of origin or at any other point and may omit any stops at any time when such action is deemed advisable or necessary.

(b) PMAS will not be responsible for failure of aircraft to depart or arrive on time or for any direct or consequential damage arising therefrom.

Claims

No action may be maintained for loss or damage to the property or baggage of a passenger or for injury to his person, or for any delay in transportation unless notice of the claim is presented in writing to the office of PMAS within thirty days after the occurrence of the loss, delay, damage or injury, and unless the action is actually commenced within sixty days after such occurrence.

Baggage and Personal Property

(a) Restrictions: Except when baggage is carried on the same aircraft on which the passenger to whom it belongs is travelling, PMAS re-

serves the right to refuse to carry such baggage and, in any event, shall have the right to examine the contents of such baggage whenever it becomes unaccompanied.

(b) PMAS reserves the right to restrict the weight, size and character of baggage and personal property according to the capacity and accomodations of the particular aircraft being used.

Transportation Between City and Airport

The ground transportation service at cities served by PMAS shall be arranged and paid for by the customer.

See Page 4 for explanation of abbreviations and reference marks.

[Stamp]: Cancelled By 1st Revised Page 9 Effective 7-30-54

Issued August 4, 1948 Effective September 12, 1948

Issued by: A. Paul Mantz, Owner,
Lockheed Air Terminal
Burbank, California.

C. A. B. No. 3
1st Revised Page 9
Cancels
Original Page 9

A. Paul Mantz, d.b.a.,
PAUL MANTZ AIR SERVICES

Charter Tariff No. 2-A

Rule No. Section 1 Rules and Regulations—Continued

Cancelled and Delayed Flights

(a) PMAS may cancel any flight at point of origin or at any other point and may omit any stops at any time when such action is deemed advisable or necessary.

(b) PMAS will not be responsible for failure of aircraft to depart or arrive on time or for any direct or consequential damage arising therefrom.

* The provisions formerly appearing in this Item 8 cancelled.

Baggage and Personal Property

(a) Restrictions: Except when baggage is carried on the same aircraft on which the passenger to whom it belongs is travelling, PMAS reserves the right to refuse to carry such baggage and, in any event, shall have the right to examine the contents of such baggage whenever it becomes unaccompanied.

(b) PMAS reserves the right to restrict the weight, size and character of baggage and personal property according to the capacity and accomodations of the particular aircraft being used.

Transportation Between City and Airport

The ground transportation service at cities
40 served by PMAS shall be arranged and paid for by the customer.

See Page 4 for explanation of abbreviations and reference marks.

Issued June 21, 1954 Effective July 30, 1954

Issued by: A. Paul Mantz, Owner,
Lockheed Air Terminal
Burbank, California

Correction No. 7

C. A. B. No. 3
Original Page 10

A. Paul Mantz, d.b.a.,
PAUL MANTZ AIR SERVICES

Charter Tariff No. 2-A

Rule No. Section 1 Rules and Regulations—Continued

Trip Insurance

$5,000.00 insurance for $1.25 may be obtained at the PMAS operational office to cover any
45 trip and not exceeding a period of twenty-four hours. The number of policies issued to any one person for any one flight is limited to five $5,000.00 policies, or a total of $25,000.00.

Explosives and Other Dangerous Articles

50 Explosives and other dangerous articles not specifically named herein will be accepted for transportation subject to the requirements provided in Part 49 of the Civil Air Regulations of the Civil Aeronautics Board.

Minimum Charges—Per Flight

The minimum charge per flight, under the rates named in this tariff, shall be:

Type of Aircraft	Minimum Charge Per Flight (In Dollars and Cents)
55	
Douglas DC3	$100.00
Gruman Goose	100.00
Lockheed 12	50.00
Cessna	25.00
Spartan Executive	25.00
Vultee BT13's	25.00

See Page 4 for explanation of abbreviations and reference marks.

Issued August 4, 1948 Effective September 12, 1948

Issued by: A. Paul Mantz, Owner,
Lockheed Air Terminal
Burbank, California.

C. A. B. No. 3
Original Page 11

A. Paul Mantz, d.b.a.,
PAUL MANTZ AIR SERVICES

Charter Tariff No. 2-A

Rule—Section 1 Rules and Regulations—Concluded
No.

Airplane Mileage Rates

△ Except when specific rates are provided in Section 2 of this tariff, the aircraft of PMAS may be chartered at the following rates:

*	Aircraft	Pass. Seats	Rate Per Mi.
60			(In Dollars and Cents)
	Douglas DC3	21	$00.85
	Gruman Goose	6	$00.85
	Lockheed 12	7	$00.50
	Cessna	4	$00.30
	Spartan Executive	4	$00.30
	Vultee BT13	2	$00.25
	Vultee BT13	1	$00.25

Layover Charges

◈ (a) Rates named in this tariff include free layover privileges based upon the total round-trip miles of the flight, as follows:

Total round-trip miles of the flight		Free Layover Time Permitted
Over	But Not Over	
0	2000	24 hours
2000	4000	48 hours
4000		72 hours

* (b) Layover time in excess of the free layover time, as provided in paragraph (a) of this rule, shall be assessed, as follows:

Type of Aircraft	Charge per day or fraction thereof (In Dollars and Cents)
Douglas DC3	$100.00
Gruman Goose	100.00
Lockheed 12	50.00
Cessna	25.00
Spartan Executive	25.00
Vultee BT13's	25.00

Federal Transportation Tax

Charter rates are subject to Federal Transporation Tax for any part of the flight where passengers are carried, so long as such tax is imposed by law.

Crew Charges

On all over night or longer flights, the person chartering the airplane will pay for the crew's meals and lodging at either the rate of $10.00 per day per person or actual expenses, at the option of the customer.

See Page 4 for explanation of abbreviations and reference marks.

Issued August 4, 1948 Effective September 12, 1948

Issued by: A. Paul Mantz, Owner,
Lockheed Air Terminal
Burbank, California

C. A. B. No. 3
Original Page 13

A. Paul Mantz, d.b.a.,
PAUL MANTZ AIR SERVICES
Charter Tariff No. 2-A

Section 2

Round-trip Rates—In Dollars and Cents

Applying between Lockheed Air Terminal, Burbank, Calif., and points named, including return to point of origin.

California	1 Way Mi.	DC 3 Grmn	Lckd	Csna Sptn	BT13
Arcata	580	$986.00	$580.00	$348.00	$290.00
Bakersfield	100	170.00	100.00	60.00	50.00
Banning	100	170.00	100.00	60.00	50.00
Barstow	110	187.00	110.00	66.00	55.00
□ΔBig Bear Lake	85	144.50	85.00	51.00	42.50
Bishop	250	425.00	250.00	150.00	125.00
Blythe	200	340.00	200.00	120.00	100.00
Calexico	210	357.00	210.00	126.00	105.00
(1) Catalina Island	(1)50	100.00	70.00	50.00	—
Crescent City	650	1105.00	650.00	390.00	325.00
Chico	450	765.00	450.00	270.00	225.00
Death Valley	200	340.00	200.00	120.00	100.00
Del Mar	110	187.00	110.00	66.00	55.00
Dunsmuir	550	935.00	550.00	330.00	275.00
El Centro	200	340.00	200.00	120.00	100.00
Eureka	570	969.00	570.00	342.00	285.00
Fresno	200	340.00	200.00	120.00	100.00
Hemet	90	153.00	90.00	54.00	45.00
Hobergs	430	731.00	430.00	258.00	215.00
Hollister	260	442.00	260.00	156.00	130.00
Indio	120	204.00	120.00	72.00	60.00
Inyokern	150	255.00	150.00	90.00	75.00
King City	210	357.00	210.00	126.00	105.00

California (Cont'd)	1 Way Mi.	DC 3 Grmn	Lckd	Csna Sptn	BT13
La Quinta	120	204.00	120.00	72.00	60.00
Lake Tahoe	400	680.00	400.00	240.00	200.00
Manzaner	175	297.50	175.00	105.00	87.50
Marysville	400	680.00	400.00	240.00	200.00
Merced	280	476.00	280.00	168.00	140.00
Modesto	290	493.00	290.00	174.00	145.00
Monterey	250	425.00	250.00	150.00	125.00
Montague	575	977.50	575.00	345.00	287.50
Mt. Shasta	560	952.00	560.00	336.00	280.00
Needles	220	374.00	220.00	132.00	110.00
Oakland	350	595.00	350.00	210.00	175.00
Oceanside	90	153.00	90.00	54.00	45.00
Palmdale	60	102.00	60.00	36.00	30.00

(1) Catalina Island is an exception to our standard rate as it is an over water flight and special equipment is required. The following higher rate is charged: DC3 and Grmn, $1.00 per mi.; Lckd, 70 cents per mi.; Csna, 50 cents per mi.

See Page 4 for explanation of abbreviations and reference marks.

Issued August 4, 1948 Effective September 12, 1948

Issued by: A. Paul Mantz, Owner,
Lockheed Air Terminal
Burbank, California

C. A. B. No. 3
Original Page 14

A. Paul Mantz, d.b.a.,
PAUL MANTZ AIR SERVICES
Charter Tariff No. 2-A

Section 2

Round-trip Rates—In Dollars and Cents

Applying between Lockheed Air Terminal, Burbank, Calif., and points named, including return to point of origin.

California (Cont'd)	1 Way Mi.	DC 3 Grmn	Lckd	Csna Sptn	BT13
Palm Springs	110	$187.00	$110.00	$66.00	$55.00
Paso Robles	175	297.50	175.00	105.00	87.50
Porterville	150	255.00	150.00	90.00	75.00
Red Bluff	500	850.00	500.00	300.00	250.00
Redding	525	892.50	525.00	315.00	262.50
Riverside	65	110.50	65.00	39.00	32.50
Sacramento	375	637.50	375.00	225.00	187.50
San Bernardino	70	119.00	70.00	42.00	35.00
San Diego	125	212.50	125.00	75.00	62.50
San Francisco	350	595.00	350.00	210.00	175.00
San Jose	325	552.50	325.00	195.00	162.50
San Louis Obispo	160	272.00	160.00	96.00	80.00
San Simeon	185	314.50	185.00	111.00	92.50
Santa Barbara	100	170.00	100.00	60.00	50.00
Santa-Cruz	310	527.00	310.00	186.00	155.00
Santa Maria	140	238.00	140.00	84.00	70.00
Santa Rosa	400	680.00	400.00	240.00	200.00
Sonora	300	510.00	300.00	180.00	150.00
Stockton	320	544.00	320.00	192.00	160.00
Tehachapi	80	136.00	80.00	48.00	40.00
Twenty-Nine Palms	140	238.00	140.00	84.00	70.00
Ukiah	450	765.00	450.00	270.00	225.00
Ventura	60	102.00	60.00	36.00	30.00

See Page 4 for explanation of abbreviations and reference marks.

Issued August 4, 1948 Effective September 12, 1948

Issued by: A. Paul Mantz, Owner,
Lockheed Air Terminal
Burbank, California

C. A. B. No. 3
Original Page 15

A. Paul Mantz, d.b.a.,
PAUL MANTZ AIR SERVICES

Charter Tariff No. 2-A

Section 2

Round-trip Rates—In Dollars and Cents

Applying between Lockheed Air Terminal, Burbank, Calif., and points named, including return to point of origin.

Nevada	1 Way Mi.	DC 3 Grmn	Lckd	Csna Sptn	BT13
Boulder City	250	$425.00	$250.00	$150.00	$125.00
*Carson City	◈380	◈646.00	◈380.00	◈228.00	◈190.00
Elko	500	850.00	500.00	300.00	250.00
Ely	410	697.00	410.00	246.00	205.00
Hawthorne	325	552.50	325.00	195.00	162.50
Las Vegas	250	425.00	250.00	150.00	125.00
Reno	400	680.00	400.00	240.00	200.00
Tonapah	275	467.50	275.00	165.00	137.50
Oregon					
Bend	750	1275.00	750.00	450.00	375.00
Corvallis	800	1360.00	800.00	480.00	400.00
Elgin	850	1445.00	850.00	510.00	425.00
Eugene	750	1275.00	750.00	450.00	375.00
Grants Pass	660	1122.00	660.00	396.00	330.00
Klamath Falls	625	1062.50	625.00	375.00	312.50
Medford	650	1105.00	650.00	390.00	325.00
Portland	850	1445.00	850.00	510.00	425.00
Salem	830	1411.00	830.00	498.00	415.00

Washington	1 Way Mi.	DC 3 Grmn	Lckd	Csna Sptn	BT13
Aberdeen	950	1615.00	950.00	570.00	475.00
Bellingham	1050	1785.00	1050.00	630.00	525.00
Colfax	900	1530.00	900.00	540.00	450.00
Olympia	950	1615.00	950.00	570.00	475.00
Seattle	1000	1700.00	1000.00	600.00	500.00
Spokane	950	1615.00	950.00	570.00	475.00
Tacoma	950	1615.00	950.00	570.00	475.00
Vancouver	860	1462.00	860.00	516.00	430.00
Walla Walla	850	1445.00	850.00	510.00	425.00
Wenatche	940	1598.00	940.00	564.00	470.00
Idaho					
Boise	700	1190.00	700.00	420.00	350.00
Coeur d'Alene	950	1615.00	950.00	570.00	475.00
Idaho Falls	750	1275.00	750.00	450.00	375.00
Lewiston	880	1496.00	880.00	528.00	440.00
Pocatello	700	1190.00	700.00	420.00	350.00
Sun Valley	800	1360.00	800.00	480.00	400.00
Twin Falls	640	1088.00	640.00	384.00	320.00

See Page 4 for explanation of abbreviations and reference marks.

Issued August 4, 1948 Effective September 12, 1948

Issued by: A. Paul Mantz, Owner,
Lockheed Air Terminal
Burbank, California

C. A. B. No. 3
Original Page 17

A. Paul Mantz, d.b.a.,
PAUL MANTZ AIR SERVICES

Charter Tariff No. 2-A

Section 2

Round-trip Rates—In Dollars and Cents

Applying between Lockheed Air Terminal, Burbank, Calif., and points named, including return to point of origin.

	1 Way Mi.	DC 3 Grmn	Lckd	Csna Sptn	BT13
Montana					
Billings	980	$1666.00	$980.00	$588.00	$490.00
Bozeman	900	1530.00	900.00	540.00	450.00
Butte	900	1530.00	900.00	540.00	450.00
Dillon	850	1445.00	850.00	510.00	425.00
Great Falls	1020	1734.00	1020.00	612.00	510.00
Helena	950	1615.00	950.00	570.00	475.00
Lewiston	1020	1734.00	1020.00	612.00	510.00
Miles City	990	1683.00	990.00	594.00	495.00
Missoula	930	1581.00	930.00	558.00	465.00
Wyoming					
Casper	900	1530.00	900.00	540.00	450.00
Cheyenne	890	1513.00	890.00	534.00	445.00
Jackson Hole	800	1360.00	800.00	480.00	400.00
Laramie	860	1462.00	860.00	516.00	430.00
Rawlins	820	1394.00	820.00	492.00	410.00
Rock Springs	720	1224.00	720.00	432.00	360.00
Sheridan	970	1649.00	970.00	582.00	485.00
Yellowstone	850	1445.00	850.00	510.00	425.00

Colorado	1 Way Mi.	DC 3 Grmn	Lckd	Csna Sptn	BT13
Colorado Springs	820	1394.00	820.00	492.00	410.00
Delta	650	1105.00	650.00	390.00	325.00
Denver	850	1445.00	850.00	510.00	425.00
Grand Junction	650	1105.00	650.00	390.00	325.00
La Junta	865	1470.50	865.00	519.00	432.50
Pueblo	830	1411.00	830.00	498.00	415.00
Trinidad	800	1360.00	800.00	480.00	400.00
Springfield	910	1547.00	910.00	546.00	455.00
New Mexico					
Albuquerque	700	1190.00	700.00	420.00	350.00
Carlsbad	850	1445.00	850.00	510.00	425.00
Clovis	900	1530.00	900.00	540.00	450.00
Demming	640	1088.00	640.00	384.00	320.00
Gallup	560	952.00	560.00	336.00	280.00
Hobbs	900	1530.00	900.00	540.00	450.00
Las Cruces	690	1173.00	690.00	414.00	345.00
Las Vegas	750	1275.00	750.00	450.00	375.00

See Page 4 for explanation of abbreviations and reference marks.

Issued August 4, 1948 Effective September 12, 1948

Issued by: A. Paul Mantz, Owner,
Lockheed Air Terminal
Burbank, California

No. 14,831.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation,

Appellee.

APPELLEE'S BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

INTERNAL REVENUE BULLETIN

REGULATIONS

STATUTES

No. 14,831.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation,

Appellee.

APPELLEE'S BRIEF.

Statement of Jurisdiction.

1. The statutory provision believed to sustain the jurisdiction of the District Court is Title 28, United States Code, Section 1346(a).

2. The statutory provision believed to sustain the jurisdiction of the Court of Appeals is Title 28, United States Code, Section 1291.

Statement of the Case.

We accept appellant's statement of the case.

Summary of the Argument.

The trial court found that the airplane flights here in question did not involve the "transportation of persons" as that term is generally understood in accordance with

its ordinary meaning and common usage, and as it is used in Section 3469(a) of the Internal Revenue Code of 1939. Appellant appears to accept general understanding, ordinary meaning and common usage as proper tests to determine the meaning of the statutory language. In order to establish its version of "transportation," however, appellant resorts to usage of the term in connection with prior federal legislation in the Motor Carrier Act and Civil Aeronautics Act. By treating this case as if the question presented is whether these flights came within the scope of such acts, appellant in fact rejects the tests it purports to accept. Two highly technical legislative enactments clearly do not establish general understanding, ordinary meaning and common usage. Under well established rules of statutory construction it is also clear that the courts will not determine the meaning of words in one statute by reference to similar words in other separate, distinct and unrelated statutes.

In order to establish that Mantz and these flights were subject to the jurisdiction of the Civil Aeronautics Board, appellant in its brief seeks to introduce new evidence on appeal. The evidence itself is clearly irrelevant; and appellant's attempt to submit new evidence in this manner should not be allowed.

In the only decision to construe the meaning of "transportation" in Section 3469(a) it was held that payments for charter of fishing boats were excluded, thus giving the statute a construction in accordance with the every day sense of the term.

Congress amended Section 3469 in 1951 to specifically exempt payments for fishing boats, reversing an erroneous application of the tax by the Commissioner of In-

ternal Revenue. The circumstances surrounding the amendment establish that the proper construction of Section 3469 is to exclude from "transportation" transactions not commonly understood to be within its scope.

Apart from the instant proceedings, the Treasury Department actually agrees with the rule for construing Section 3469 which was adopted by the District Court. This is shown by the exemption of circus trains from tax in the Treasury Department's regulations although no express provision therefor is found in the statute.

When Section 3469 was enacted in 1941 Congress intended this excise tax to restrict the volume of the usual forms of transportation. "Transportation," as used in Section 3469, was never intended to cover the isolated or special type of flights involved herein.

These flights were not for the purpose of transportation. The Treasury Department's regulations also recognize that payments are subject to tax only when made for purposes of transportation.

The District Court made a reasonable construction of the statute and one which is consistent with established rules for statutory construction. Appellant has not advanced any relevant argument to show error in the District Court's opinion. Appellant's complaint in substance is that the District Court's interpretation of the meaning of "transportation" differs from its own, but in attempting to support its own interpretation, appellant's argument goes contrary to principles of long standing, rejects the principles it purports to accept, and is antagonistic to the Treasury Department's own regulations. We believe that appellant has failed to show any error by the District Court.

ARGUMENT.

I.

The District Court Correctly Held That the Payments For the Airplane Flights Involved in This Case Were Not Subject to the Tax on Transportation of Persons Under Section 3469(a) of the Internal Revenue Code of 1939.

A. Appellant's Attack on the Decision Below Is Based on Issues Irrelevant to This Proceeding.

Although this is a tax case, appellant has devoted substantially its entire brief to questions which might arise under the Civil Aeronautics Act of 1938, Chap. 601, 52 Stat. 973. Whether Mantz was a common carrier and whether the particular flights involved herein were subject to regulation by the Civil Aeronautics Board has no relevance whatsoever to this case. For purposes of argument, however, we can concede that Mantz was a common carrier and these flights were subject to regulation by the Board. From this it obviously does not follow that the flights were also subject to the transportation tax.

Appellant's position in essence is that if Mantz and these flights are covered by the Civil Aeronautics Act they are also covered by the tax on transportation of persons. This position violates all accepted rules of statutory construction. It is well established that separate acts on distinct subjects will not be read together.

Walling v. Portland Terminal Co., 330 U. S. 148, 150, 67 Sup. Ct. 639; 91 L. Ed. 809, 812 (1947);

Lane v. Railroad Retirement Board, 185 F. 2d 819, 822 (6th Cir., 1950);

Northern Pac. Ry. Co. v. United States, 156 F. 2d 346 (7th Cir., 1946), aff'd 330 U. S. 248; 67 Sup. Ct. 747, 91 L. Ed. 876 (1947).

It has been specifically held that the meaning of "transportation" in the Interstate Commerce Act has "slight force, if any" in determining the meaning of the same term in the Natural Gas Act.

Federal Power Commission v. East Ohio Gas Co., 338 U. S. 464, 470, fn. 9, 70 Sup. Ct. 266, 94 L. Ed. 268, 276, fn. 9 (1950).

We contend, as the District Court held, that "transportation" as used in Section 3469(a) of the Internal Revenue Code of 1939 should be interpreted as that term is generally understood in accordance with its ordinary meaning and common usage. As the Supreme Court stated, ". . . the words of a statute—including revenue acts—should be interpreted in their ordinary every day senses." (*Crane v. United States,* 331 U. S. 1, 67 Sup. Ct. 1047, 91 L. Ed. 1301, 1306 (1946).) A more specific guide to the construction of Section 3469(a) is found in the cases arising under the tax on transportation on property, imposed by Section 3475, Internal Revenue Code of 1939, which have held that "transportation" as there used should be given its ordinary meaning as generally understood.

Getchell Mine, Inc. v. United States, 181 F. 2d 987 (9th Cir., 1950);

Edward H. Ellis & Sons v. United States, 187 F. 2d 698 (3rd Cir., 1951);

Kerns v. United States, 204 F. 2d 813 (4th Cir., 1953);

Castle Shannon Coal Corp. v. United States, 98 F. Supp. 163 (D. C. Pa., 1951).

Appellant has referred to these cases, upon which appellee relied below, but dismisses them as not relevant because they involve the transportation of property under Section 3475 and not of persons under Section 3469. [App. Br. pp. 14-15, fn. 2.] We do not contend that the ultimate findings in these cases are precedent on both facts and law for the case at bar. We do contend, however, that there is no basis for distinguishing the rule of statutory construction which these courts employed to reach their ultimate findings. Further, appellant's rejection of the authority of these cases under Section 3475 on the ground of differences between Section 3469 and Section 3475, which both impose excise taxes on transportation and were both originally enacted in the Revenue Act of 1941, is remarkable in view of appellant's own efforts to assimilate Section 3469 with decisions arising under the entirely separate, distinct, and unrelated Civil Aeronautics Act and Motor Vehicle Act.

We believe, therefore, that appellant cannot show the ordinary meaning of "transportation" in common usage by illustrating the use of that term in separated and unrelated prior acts. To accept appellant's suggestion would not only be contrary to all the authorities cited above, but would produce the somewhat startling result that the "ordinary every day senses" of words are to be garnered from highly technical prior legislation.

B. Appellant's Attempts to Introduce New Evidence on Appeal Should Not Be Condoned.

Appellant's argument is not only irrelevant, as we believe we have shown, but is based on evidence not in the record. The tariff schedules included in Appendix B of appellant's brief were not introduced in evidence before the District Court. They could be before this

court only on the theory of judicial notice. Yet this court has specifically held that it would not take judicial notice of similar tariff schedules.

> *El Dorado Terminal Co. v. General American Tank Car Corporation,* 104 F. 2d 903 (9th Cir., 1939), *rev'd on other grounds,* 328 U. S. 12, 66 Sup. Ct. 843, 90 L. Ed. 1053 (1940).

Accord:

> *Lichten v. Eastern Airlines, Inc.,* 8 F. R. D. 138 (D. C. N. Y. 1948).

The existence of such schedules was known at time of trial and copies were easily obtainable. We submit that it is improper for appellant to seek to introduce new evidence on appeal which, for lack of timely presentation, would not even have been ground for a new trial in the court below.

See:

> *United States v. Bronsen,* 142 F. 2d 232 (9th Cir., 1944);
>
> *Gibson v. International Freighting Corp.,* 173 F. 2d 591 (3rd Cir., 1949), *cert. den.* 338 U. S. 832, 70 Sup. Ct. 47, 94 L. Ed. 507 (1949).[1]

The same impropriety exists in appellant attempting to show, although irrelevant, that Mantz was a common carrier by referring to facts alleged in pending, but undecided, cases not before this court. [App. Br. p. 17, fn. 6.] Only in exceptional circumstances, not here present, will

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[1]Further indication of the irrelevance and unreliability of appellant's Appendix B is that of the five different models of airplanes involved in the flights in question, two (L-I-E and B-25) are nowhere mentioned in Appellant's Appendix B. [R. 19-20.]

a court take notice of proceedings in other cases which are not in evidence.

Ellis v. Cates, 178 F. 2d 791, 793 (4th Cir., 1949), *cert. den.* 339 U. S. 964, 70 Sup. Ct. 998, 94 L. Ed. 1373 (1950);

A. G. Reeves Steel Const. Co. v. Weiss, 119 F. 2d 472, 474 (6th Cir., 1941), *cert. den.* 314 U. S. 677, 62 Sup. Ct. 181, 86 L. Ed. 541 (1941).

C. No Issue of Transportation From "Point to Point" Is Involved in This Proceeding.

Appellant states that appellee contended before the District Court that the movements in this case did not constitute transportation because our employees were picked up and discharged at the same point. [App. Br. p. 10.] This statement is not correct. The question of "point to point" transportation arises only under Section 3475(a), relating to transportation of property, which requires that the transportation be "from one point in the United States to another." We have never contended that the reason these flights were not taxable transportation of persons under Section 3469 was that they were exempt under Section 3475(a) which obviously has no application.[2] What we contend is that these flights did not constitute "transportation" within the meaning of Section 3469(a) because appellee's employees did not travel to go, or to go and come back from anywhere, that is, they had no destination as such. Appellant does

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[2]The contention was omitted for the reason stated and not for lack of authority. "Transportation implies the taking up of persons or property at some point and putting them down at another." *Gloucester Ferry Co. v. Pennsylvania,* 114 U. S. 196, 203 (1885).

admit that some forms of air travel are not "transportation" such as going aloft "merely to experience the sensation of flight." [App. Br. p. 12.] The use of the airplanes by appellee's employees is even further removed from the usual conception of air travel. The cameramen doing photography from the air needed an elevated moving base for their cameras. The discovery of suitable ground locations required observation from an elevation not possible except from an airplane. But, we submit, payments by appellee for flights for such purposes were not for "transportation" in its every day sense.

The regulations of the Commissioner of Internal Revenue, as approved by the Secretary of the Treasury, has recognized that the *purpose* of the payments in question is material.

Reg. 42, Section 130.53(i) provides:

> "(i) Chartered conveyances. An amount paid for charter of a special car, train, motor vehicle, aircraft or boat *for transportation purposes,* provided no charge is made by the charterer to the persons transported, is subject to tax if the amount paid represents a per capita charge of more than 35 cents for each person actually transported. (For information with respect to the exemption of amounts paid on or after November 1, 1951, for transportation, on or after that date, of persons on boats chartered for fishing purposes, see section 130.60a)." (Emphasis added.)

By expressly limiting taxability to payments for transportation purposes, this regulation exempts appellee's payments because they were not paid for transportation purposes.

II.

The Only Judicial Construction of the Meaning of Transportation in Section 3469 Supports Appellee's Position.

Only one court, so far as appellee is aware, has passed upon the meaning of "transportation of persons" in Section 3469. In *Smith v. United States,* 110 F. Supp. 892 (D. C. Fla., 1953), the court held that payments for use of a fishing boat were not subject to the tax on transportation of persons.[3] In this case the captain-owner of the boat carried parties out in the boat to fish and would furnish tackle, bait, and a helper to clean the catch. Charges were based upon a flat rate for a minimum number of hours, plus an additional charge per hour for each hour over the minimum, without regard to the number of persons aboard the boat. The court emphasized that the charges were not based upon the number of persons aboard and held the payments were not for "transportation" under the statute.

The *Smith* case supports appellee's position. There the operator of the boat carried his passengers into positions suitable for fishing; in the subject case each pilot carried his passengers into positions suitable for aerial photography or observation.

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[3]The *Smith* case is actually the first of a series of fishing boat cases decided by the same court and judge. See *Harris v. United States,* 55-1 U. S. T. C. par. 49,111 (1955); *Gibson v. United States,* 55-1 U. S. T. C. par. 49,112 (1955); *Walls v. United States,* 55-1 U. S. T. C. par, 49,113 (1955); *Knowles v. United States,* 55-2 U. S. T. C. par. 49,148 (1955). In *Gibson v. United States,* 54-2 U. S. T. C. par. 49,055 (1954), the court states that one of the few areas the tax on fishing boats was applied was in the jurisdiction of that court.

Appellant states that the *Smith* decision was erroneously decided because there the court relied "solely" upon cases involving the tax on transportation of property under Section 3475. [App. Br. p. 14.] This statement is not correct. Included among the authorities cited by the court was *De Luxe Check Printers v. Kelm,* 99 F. Supp. 785 (D. C. Minn., 1951) which involved the federal excise tax on luggage under Section 1651. This is pointed out not to seize upon an inadvertence but to show appellant's complete misconception of the basis for the *Smith* decision. The supporting decisions were obviously not cited by the court for their factual similarity but as authority for its opinion that "transportation" in Section 3469 should not be given a technical meaning.[4]

Appellant also seeks support for its position from the 1951 amendment to Section 3469(a), which exempted from transportation the tax amounts paid by fishing boats. [App. Br. p. 13.] This amendment occurred approximately two years prior to the *Smith* decision. Appellant quotes the following statement in the report of the Senate Committee on Finance:

> "Under present law amounts paid for transportation in boats where the transportation takes place

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[4]Appellant also states no appeal from *Smith* in 1953 was warranted because the 1951 amendment to Section 3469(a), hereafter discussed, made the question moot. [App. Br. p. 15, fn. 3.] This statement appears to be a departure from previous policy. See, *i. e.,* Rev. Rul. 55-58, Int. Rev. Bull. No. 5, p. 9, January 31, 1955 which expressly states that the Internal Revenue Service will continue to treat as ordinary income payments received after 1950 from certain patent assignments notwithstanding such payments might be capital gain under the Internal Revenue Code of 1954. Further, two years after the *Smith* decision the Commissioner still maintained payments for fishing boats were subject to tax. See cases cited fn. 3, *supra.*

> for the sole purpose of fishing from the boat have been *held* to be taxable under these sections. (Emphasis added.) [App. Br. p. 13.]

By whom was this "held"? So far as we are aware the only such holding was by the Commissioner of Internal Revenue. Appellant's untenable argument thus appears to be that if the Commissioner takes a position that is subsequently overruled by Congress, in some manner this proves the Commissioner to have been correct. It seems clear that appellant's statement that Congress approved the Commissioner's technical construction of "transportation" by considering payments for fishing boats properly subject to tax are completely unwarranted.

Appellant further argues that the *Smith* case was wrongly decided because the court failed to recognize Congressional intent in connection with the 1951 amendment. If the amendment made a *change* in the law as appellant contends, then the court, under the accepted rule of construction, should have held that what the amendment exempted from tax was taxable prior to the amendment. By exempting the payments made even before the amendment, however, the court clearly showed that it, as well as Congress, considered the amendment only declaratory of existing law by its disapproval of the Commissioner's position.

The final contention of appellant to be considered in connection with the 1951 fishing boat amendment is that this specific exemption by Congress excludes exemption of other forms of transportation not expressly enumerated. [App. Br. pp. 13-14.] We submit that this argument is fallacious for several reasons.

First, the premise of the argument is that the payments by appellee were taxable unless specifically exempted. But if these payments were not for "transportation," as the District Court held, then they did not fall within the scope of the statute in the first place. Appellant's argument thus assumes the point at issue in the proceedings below.

Second, if the *Smith* case was correctly decided, which we contend it was, the 1951 amendment made it mandatory for the Commissioner to follow the original Congressional intent. Since the statute was thus not applicable to at least one situation prior to the amendment, it is apparent that there could be and are other transactions to which it also does not apply.

Finally, it is significant that the Treasury Department's own regulations provide for an exemption which is not enumerated in the statute.

Treas. Reg. 42, Sec. 130.54 provides:

> "(f) Circus or show trains.—The amount paid pursuant to a contract for the movement of a circus or show train is not subject to tax where the amount covers only the transportation of the performers, laborers, animals, equipment, etc. by the circus or show train. However, if the contract payment also covers the issuance to advance agents, bill posters, etc., of circus or show scrip books, or other evidence of the right to transportation, for use on regular passenger trains, that portion of the contract payment properly allocable to such scrip books or other evidence is subject to the tax."

Since the statute contains no express provision for such an exemption, the regulation necessarily means that the Treasury Department construes the statute to permit

exemptions not expressly mentioned. Appellant's argument before this Court, and upon which it relied below, thus is antagonistic to its own published regulations.

We do not claim that we, or other taxpayers, are entitled as a matter of law to the same exemption as circus trains. We do contend, however, that this Treasury Regulation presents a rule for construction of Section 3469(a) by which appellant is bound until it is revoked and, further, that reenactment of the statute without any change of this rule of construction "bespeaks Congressional approval." *United States v. Anderson, Clayton & Co.* (U. S. Sup. Ct.) 24 L. W. 4001, 4005 (November 7, 1955).

III.

The District Court Correctly Construed Section 3469 in Accordance With Its Intent and Purpose.

The excise tax on transportation of persons was enacted in 1941 primarily for the purpose of curtailing excessive use of transportation facilities. Congress intended the tax to reduce the burden on transportation facilities which were used to convey through continual use large numbers of persons. Congress was not concerned about isolated payments for flights for such specialized reasons as those in the case at bar.[5]

The term "transportation" was thus used in its ordinary sense connoting movement for the purpose of traveling. We may assume, as appellant has done, that in addi-

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[5]See debates in Congressional Record, Appendix A, herein. The Court may use informed discussion in Congress when any doubt exists. (*United States v. C.I.O.*, 335 U. S. 106, 113, 68 Sup. Ct. 1349, 92 L. Ed. 1849, 1856.)

tion to the particular flights in question Mantz also carried passengers for transportation purposes within the scope of Section 3469. [App. Br. p. 16.] But the fact that some or all of Mantz's other flights were subject to tax does not, of course, bear on the case at bar. We are here concerned only with flights for the purpose of taking motion pictures or aerial observation, and not for the purpose of transportation.

Our position herein will not open the door to avoidance of the transportation tax. It is not disputed by appellant that each flight in question was for the purpose described in the Findings of Fact by the District Court. [R. 11-22.] It would not be difficult for the Commissioner to determine whether all or part of any additional flights in the future were in substance for transportation rather than in accordance with the facts in the case at bar.

Conclusion.

In order not to repeat the summary which preceded this argument it will be enough to say, as we think has been shown, the judgment appealed from is in all respects correct and should be affirmed.

Respectfully submitted,

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DONALD T. ROSENFELD,
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LOEB AND LOEB,
Of Counsel.

APPENDIX A.

94 Congressional Record, 80th Congress, 2d Session (Senate).

Senator McCarren (Nevada) speaking on behalf of his amendment to repeal the excise tax on the transportation of persons declared that the tax was imposed in 1941 as a war measure for two reasons. The lesser reason he declared was for the collection of revenue but the tax was "largely imposed at a time when troops were being moved across the continent and elsewhere, and when we wanted as much space on rail and bus and air facilities as we possibly could obtain for the moving of our troops, and those in government compelled to travel. So we were anxious to curtail travel.

"At that time there was a general hue and cry about curtailing travel. Everyone was supposed to remain at home as much as possible and thus avoid congestion in vehicles of travel . . ." [pp. 3137-39].

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95 Congressional Record, 81st Congress 1st Session (House).

McDonough (Calif.): "These taxes (levied on communications and on transportation) were imposed during the war to discourage the use of our overburdened communications and transportation facilities as well as to raise needed revenue for the prosecution of the war. . . .

"The present excise tax on the transportation of both property and persons operates as a sales tax upon an essential service that is not a luxury and has to be used repeatedly by large sections of the population. . . ." [Appendix, p. 9, A 3545.]

Short (Missouri): ". . . Most everyone realizes that during the war it was necessary for us to raise

additional revenue by so-called luxury taxes. . . . Of course it was necessary to have taxes on these articles not merely to raise revenue, but also to discourage the public's buying and use of these commodities and services during wartime. . . ." [Appendix, p. 9, A 4929.]

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96 Congressional Record, 81st Congress 2nd Session (House).

Martin (Mass.) *re* wartime excise taxes: "May I say these taxes in the first instance were not proposed as revenue measures. They were to discourage travel on the railroads; they were to discourage people from talking too much on the telephone; they were to discourage people from going into industries where the demand for goods was not fully in accord with the war effort. That is the main reason these taxes were imposed . . ." [p. 994].

Elston (Ohio): ". . . it should be remembered that taxes on transportation and communication were not levied in the first instance to produce revenue. They were assessed solely to discourage wartime travel and to make all systems of communications more readily available for war purposes." [p. 1378.]

Young (Ohio): "They (excise taxes) were imposed upon transportation to bring in revenue and to discourage travel . . . It (the tax on transportation) was passed as a war measure to discourage unnecessary travel, to free the railway systems for the transportation of troops and supplies . . ." [pp. 1533, 1534].

Van Zandt (Penn.): "Taxes on transportation and communication were assessed solely to discourage wartime travel so that such systems would be readily available for war purposes rather than for the purpose of producing revenue." [Appendix, p. A 1475.]

No. 14831

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION, a Corporation,

Appellee.

On Appeal From the Judgment of the United States District Court for the Southern District of California.

REPLY BRIEF FOR THE APPELLANT.

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TABLE OF AUTHORITIES CITED

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REPLY BRIEF FOR THE APPELLANT.

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1. Apparently taxpayer agrees (Br. 8) that the determination as to whether the movements in this case constitute transportation of persons does not depend upon whether or not its employees were picked up and discharged at the same point. Instead, taxpayer contends that these flights do not constitute transportation because (Br. 8-9) its employees did not have any destination as such, and because there were other purposes in having its employees flown to certain localities. Essentially, therefore, taxpayer is contending that, notwithstanding the fact that its employees were carried to certain areas by Mantz,

such movements should not be considered transportation because its employees went aloft to photograph scenes or to search for locations. We submit that such contentions lack merit.

Although taxpayer may have chartered airplanes from Mantz in order to enable its employees to perform these other functions, this cannot negate the fact that one of taxpayer's prime purposes in chartering these airplanes was to have its employees carried from the place where they were picked up to other localities in order to enable them to perform these other functions. Furthermore, in most instances, Mantz was not concerned as to what activities taxpayer's employees intended to carry on in the airplanes during these flights; instead, Mantz' concern was directed to carrying these employees to areas selected by them.

The lack of merit in taxpayer's contentions also may be illustrated by the fact that if its employees had been driven by bus or limousine to the locality where scenes were to be photographed or where locations were to be explored, or were flown to such points by Mantz and the flights terminated at such places, after which the employees were carried aloft to photograph scenes, etc., there would be no question but that the limousine or bus trip or the flights to and from these localities would constitute transportation. Consequently, it would appear that the same result should apply where these employees were taken to the areas desired by them and permitted to photograph scenes or search for locations without any interruption in their flights. In both of these instances it is clear that the movement of taxpayer's employees was both necessary and intended in order to carry out these other functions,

and, in this respect, taxpayer's employees had a place to go. The alleged fact that these other purposes of aerial photography and air searching could be accomplished only in the carrier, *i. e.,* while the person is being transported, is immaterial and should not prevent the carriage from constituting transportation.

2. We do not have any quarrel with the taxpayer's assumption (Br. 5) that the meaning of the term "transportation" should be determined in accordance with its ordinary meaning and common usage. However, we do urge that the taxpayer, as well as the court below, has erred in failing to consider the many court decisions, which hold that the term's ordinary meaning and common usage covers a carriage from place to place, irrespective of the purpose of the movement, and which encompass the movements involved in this case. In particular, we urge that the District Court erred when it ignored the decisions arising under Part II of the Interstate Commerce Act (Motor Carrier Act, 1935, c. 498, 49 Stat. 543), and the Civil Aeronautics Act of 1938, c. 601, 52 Stat. 973, and analogous statutes, which regulate movements similar to those involved in this case.* Since the term "transportation" had already acquired a well-established meaning in these prior enacted statutes, it would appear reasonable to assume that, by using terminology in Section 3469 of the

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*It also may not be remiss to point out that none of these cases support taxpayer's contention that the carriage of persons does not constitute transportation because the persons being carried intended to accomplish additional results while undergoing the flight. See *Aplin v. United States,* 41 F. 2d 495 (C. A. 9th), where this Court held a person who engaged in illicit relations with a woman before their departure from a state, during the course of their trip and after its termination, was engaged in transporting the woman under the Mann Act.

1939 Code similar to that which it previously had employed in regulating similar movements of persons, Congress intended to subject to tax movements similar to those which previously had been held to constitute transportation of persons. (See Govt's. Br. 11-12.) These movements constituting the transportation of persons by air, rail or motor vehicle, which are subject to regulation by the Civil Aeronautics Board and the Interstate Commerce Commission, are more nearly like the movements involved in this case than, as we shall point out, *infra,* movements of property, or the transportation by pipeline of natural gas or petroleum products. (See taxpayer's Br. 5.)

On the other hand, taxpayer's contention (Br. 5-6) that cases arising under Section 3475 of the 1939 Code, dealing with transportation of property, should be of guidance in the resolution of cases involving the transportation of persons, is inapposite, since there are great differences between the transportation of property and of persons which limit the applicability of the decisions arising under the property provision. (Govt. Br. 14-15.)

Furthermore, the removal by Congress of the various restrictions surrounding the term "transportation" when it enacted Section 3469 indicates that Congress intended to subject to the tax in the case of persons movements not covered by Section 3475. For example, Section 500 of the Revenue Act of 1917, c. 63, 40 Stat. 300, and Section 500 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, the original provisions enacting a transportation tax levied, the tax upon—

> the transportation of persons by rail or water, or by any form of mechanical motor power on a regular established line when in competition with carriers

> by rail or water, from one point in the United States to another or to any point in Canada or Mexico, * * *.

The provisions levying a tax upon the transportation of property similarly restricted the term "transportation" so as to require that the person in question be engaged in competition with carriers as well as "engaged in the business of transporting parcels or packages by express over regular routes between fixed terminals, * * *." However, when Congress in 1941 added Section 3469 to the Internal Revenue Code of 1939, the statute here involved, it did not reintroduce the previously existing limitations of the 1917 and 1918 acts for the transportation of persons, but instead applied the tax broadly to cover "the transportation, on or after such effective date, of persons by rail, motor vehicle, water or air, within or without the United States, * * *." On the other hand, when the tax on property was reenacted by Section 620 of the Revenue Act of 1942, c. 619, 56 Stat. 798, many of the old limitations were continued in the new statute, which applied the tax only "upon the amount paid * * * for the transportation, * * * of property by rail, motor vehicle, water, or air from one point in the United States to another" and "only to amounts paid to a person engaged in the business of transporting property for hire, * * *." Consequently it is clear that the scope of the term "transportation" as it applied to persons in Section 3469 was expanded beyond the scope contained in the earlier cases and the earlier taxing statutes.

That Congress *itself* considered that it had applied the tax on persons broadly also seems apparent from the language of the report of the Senate Committee on Fi-

nance (S. Rep. No. 781, 82d Cong., 1st Sess., p. 108 (1951-2 Cum. Bull. 458, 535)) wherein, commenting upon the 1951 amendment of Section 3469(a) to exempt from the tax "amounts paid for transportation by boat for the purpose of fishing from such boat" the Committee stated its understanding that—

> Under present law amounts paid for transportation in boats where the transportation takes place for the sole purpose of fishing from the boat have been held to be taxable under these sections.

Nor is there any merit to taxpayer's contention (Br. 14) that the purpose of the tax was limited "to reduce the burden on transportation facilities which were used to convey through continual use large numbers of persons" and that "Congress was not concerned about isolated payments for flights for such specialized reasons." In the first place, taxpayer's contention overlooks the factor that if Congress had intended to restrict the tax on persons to scheduled movements by rail, air, etc., then Congress easily could have retained the former restrictions appearing in the 1917 and 1918 statutes, particularly since similar restrictions were retained in Section 3475. Secondly, even under taxpayer's interpretation, the tax would apply to charter flights of regulated air common carriers, which taxpayer concedes Mantz to be. (Br. 4.) Thirdly, the legislative history of the enactment of Section 3469, *i. e.,* to discourage wartime travel, to make these facilities available for defense purposes and *to conserve the nation's stock of gasoline,* would necessarily apply to the flights involved in this case. (See Govt's. Br. 16, fn. 4.) In any event, although the reasons which prompted the enactment of these transportation taxes have since disappeared, their continuation by Congress

indicates a present purpose to obtain revenue, which obviates any reason to restrict the term's meaning in the manner sought by taxpayer.

3. Taxpayer's contention (Br. 13-14) that Section 130.54(f) of Treasury Regulations 42 (1942 ed.) exempts the movements of circus or show trains, and that the Government should apply this exemption to the movements of this case, is without foundation. In the first place, this provision does not exempt circus and show trains from all taxes, but subjects them, instead, to the tax on transportation of property. See, Treasury Regulations 113 (1943 ed.) Section 143.14(a). Although both persons and property are transported in circus and show trains, it has been recognized by the railroads and circuses that these movements involve special situations, in that at the time the contracts are entered into and the rates are fixed, neither party knows how many laborers or performers will be carried. Since no method has been found to allocate the transportation charges between the persons and property transported, and since the contract was entered into primarily to haul circus equipment, regardless of the number of persons carried, the entire contract has been considered to relate to the transportation of property. See, Section 130.54 of Treasury Regulations 42, which holds that the tax on persons shall not apply to the transfer of freight where a person accompanies the freight, but that such movement shall be taxed entirely as the transportation of property. See also, Rule 8 of Railway Accounting Rules, 1952, published by the Accounting Division, Association of American Railroads. Since the movements in this case clearly involve the carriage of persons and are not even remotely analogous to

the movements of circus or show trains, taxpayer's attempt to utilize Section 130.54(f) to exempt the movements herein from *all* taxes should not be permitted.

4. Taxpayer's contention (Br. 6-7) that this Court should not take judicial notice that a tariff has been filed by Mantz in accordance with regulations of the Civil Aeronautics Board is mistaken, since an appellate court may take judicial notice of the existence of public documents of federal agencies, such as rules, regulations, circulars, etc., which are similar to the documents involved herein, although these documents were not introduced into evidence before the lower tribunal. *Labor Board v. Atkins & Co.*, 331 U. S. 398, 406 fn. 2.

Conclusion.

For the reasons stated, it is submitted that the judgment of the District Court below is erroneous and should be reversed by this Court.

Respectfully submitted,

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